IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

CITATIONS.

Cases.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners, John D. Carey, et al., pray that a writ of certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the Seventh Circuit entered on November 22, 1976 reversing and remanding the decision of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW.

The opinion of the Court of Appeals reversing the decision of the District Court is reported at 545 F. 2d 30. It is reproduced in Appendix A to this Petition at p. A1.

The memorandum opinion of the District Court was not reported. It is reproduced in Appendix A to this Petition at p. A5.

JURISDICTION.

The decision of the Court of Appeals was entered on November 22, 1976. The jurisdiction of this Court is invoked under the provisions of 28 USC § 1254(1).

QUESTIONS PRESENTED.

1. Whether the decision of the Court of Appeals, holding that plaintiffs who prevail on a claim of violation of civil rights are entitled as a matter of law to general compensatory damages absent a showing of injury or pecuniary loss, substantially conflicts with the holdings of other Circuit Courts of Appeals which permit a denial of such damages or allow an award of only nominal damages?
2. Whether the Court of Appeals erred in substituting its own judgment for that of the District Court, sitting as the trier of facts, when it determined that the plaintiffs were not entitled to compensatory damages because they, respectively, failed to establish any injury and failed to quantify their damages?

STATEMENT OF THE CASE.

These are consolidated cases wherein the minor plaintiffs, Silas Brisco and Jarius Piphus, seek relief upon a claim that their respective suspensions from school violated their constitutional due process rights.

a. Silas Brisco.

Silas Brisco attended the fifth grade at the Barton Elementary School in 1972-1973 school year. During this period of time, the school was in a transition from a predominantly white to predominantly black enrollment. Barton School officials were aware of physical violence connected with gang rivalries and recruitments in the school and that, in addition, a single earring was a symbol of certain gang membership. During the 1972-1973 school year at Barton, black male students began to attend the school wearing these earrings. School officials determined that in the interest of student safety, male students would be prohibited from wearing these earrings.

Following the establishment of the earring prohibition rule, various male students were orally informed of the rule and were warned that continued wearing of the earring could result in suspension. Silas Brisco had actual notice of the earring ban. In May of 1973, school officials noticed the appearance of certain earrings denoting gang membership in a branch of the Disciples street gang, the "Boss Pimps Disciples." The particular earring which Brisco wore was recognized by school officials as denoting officership in that gang.

In May of 1973, Silas Brisco was told to remove the earring or face suspension. He refused to do so and was suspended for a portion of the school day. Thereafter, his mother met with the District Superintendent and Brisco agreed to remove the earring and was readmitted.

After school reconvened for the Fall semester, 1973, Brisco again wore the earring to school on September 11, 1973 and during the course of the school day was brought to the principal's office where the principal and assistant principal directed him to remove the earring. Brisco refused. The principal then conferred with the District Superintendent and informed Brisco that he must comply with the rule or face suspension.

When Brisco refused to remove the earring, the assistant principal left the office area, telephoned Brisco's mother and wrote up a suspension report form. When Mrs. Brisco came to the school and conferred with the school officials, she was informed that her son would be suspended if he continued to refuse to comply with the earring rule. Mrs. Brisco supported her son, and the twenty-day suspension was then imposed. After having served 17 days of the suspension, Brisco was voluntarily readmitted during the pendency of a Motion for Preliminary Injunction in this action.

b. Jarius Piphus.

Jarius Piphus was a student at Chicago Vocational High School (CVS) during the 1973-1974 school year. The written rules of CVS prohibited cigarette smoking and bringing intoxicating substances on to school property. Jarius Piphus had actual notice of these rules.

On January 23, 1974, the school principal observed Piphus and another student passing an irregularly shaped cigarette between them. As the principal neared the boys, he smelled smoke which he believed to be the odor of marijuana. The principal also observed Piphus attempting to pass cigarette papers to the other student. When the boys saw Mr. Brown, they discarded the cigarette and no attempt was made to recover the cigarette. Piphus admitted smoking the cigarette but denied that the substance he was smoking was marijuana.

The principal accompanied the two students to the school's disciplinary office and there instructed the assistant principal

to impose the "usual procedure" of a twenty-day suspension. Although the principal admits that it was his decision to suspend Piphus, the formal suspension was effected by the assistant principal. At the time of the suspension, the assistant principal informed Piphus that he was being given a twenty-day suspension for smoking cigarettes. Piphus later learned that the reason also including class cutting.

Subsequently, two meetings were held among the school officials, Mr. Piphus, members of his family, and legal aid representatives. These meetings were not hearings but rather were for the purpose of explaining the previous actions taken. At the second meeting, the legal aid representatives were excluded when they attempted to tape record the session. Upon administrative review by the District Superintendent, Piphus' suspension was reduced to five days. Concurrently, Judge Bauer entered a temporary restraining order requiring the readmission of Piphus. He missed eight days of classes.

c. Findings.

The District Court found that the suspensions in question raised two legal issues: whether the students were given sufficient prior notice of conduct which was prohibited, and whether adequate hearings were held at the time each boy was suspended.

The Court went on to find that both Brisco and Piphus had actual notice of reasonably narrow regulations of prohibited conduct. Because both suspensions potentially exceeded ten days, both boys were found entitled to receive a formal evidentiary hearing, which should include:

1. Pre-hearing notice, including a short summary of the evidence upon which the administrator intends to rely.
2. To be represented at the hearing either by counsel or other responsible advocate.
3. To present witnesses on his own behalf and cross examine witnesses.

4. At his own expense, to make a tape recording or transcript of the hearing.
5. An impartial hearing officer to preside.

Accordingly, both Brisco and Piphus failed to receive adequate disciplinary hearings; the decisions to suspend both of them were made by their major factual accusers; neither had an opportunity to present maningful evidence; conferences were held following the decision to suspend them; and in the case of Jarius Piphus, his attorneys were excluded from a post-suspension conference and not allowed to make a tape recording of the conference.

Each plaintiff is entitled to a declaration that his suspension in question was unconstitutional.

Each plaintiffs' school records should be corrected to expunge any reference to these suspensions.

None of the defendants acted maliciously in enforcing the disciplinary school policies against the plaintiffs, and the defendants undoubtedly believed they were protecting the integrity of the educational process.

The defendants were nonetheless not immune from monetary liability because under the "*Linwood* Rationale"[1] defendants should have known that the plaintiffs were entitled to some type of an adjudicative hearing.

An award of damages must be based upon some proof to a reasonable degree of certainty. Plaintiffs put no evidence into the record to quantify their damages. In addition, plaintiffs put no evidence into the record which could form a basis of even a speculative inference measuring the extent of their respective injuries. Damages, accordingly, denied due to a complete lack of proof thereof.

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On plaintiffs' post-trial motions, Judge McLaren reopened the issue of damages and the plaintiffs submitted arguments and

1. *Linwood* v. *City of Peoria*, 463 F. 2d 763 (7th Cir. 1972)

exhibits in support of an award. Following the death of Judge McLaren, the case was assigned to Judge George N. Leighton; and on April 6, 1976, he denied the plaintiffs' motions, citing the same reasons cited by Judge McLaren.

Plaintiffs appealed the trial court's failure to award general compensatory damages and the trial court's failure to clearly grant the requested declaratory and injunctive relief.

The Seventh Circuit Court of Appeals held for plaintiffs-appellants on all issues. Significantly, the Court held that plaintiffs whose civil rights have been violated are entitled to recover general compensatory damages "inherent in the nature of the wrong," even though the plaintiff has failed to establish individual injury or pecuniary loss.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals' holding that general compensatory damages are mandated in a civil rights action brought under 42 USC 1983 without proof of injury is a compelling reason for the Supreme Court of the United States to grant a Writ of Certiorari in this case. The District Court, as the trier of fact, found that plaintiffs had neither established the injury nor quantified their damages with sufficient particularity and were therefore not entitled to damages. The Court of Appeals reversed and ruled as a matter of law that when a deprivation of civil rights has been established, a plaintiff is absolutely entitled to an award of general compensatory damages even in the absence of an individualized injury and even if no pecuniary loss is shown.

This holding of the Circuit Court of Appeals for the Seventh Circuit is clearly in conflict with decisions of other Circuit Courts of Appeals on the same issue. The other Circuit Courts of Appeals and district courts are also in conflict as to the proper rule of damages to be applied. In *Smith* v. *Losee*, 485 F. 2d 334 (10th Cir. 1973) the Court of Appeals for the Tenth Circuit reversed an award for general compensatory damages, while affirming a finding that an associate professor of a state junior college had been wrongfully discharged and denied tenure when he had been in lawful exercise of his first amendment right of free speech. On the issue of general compensatory damages, the court sitting *en banc* held, at page 344:

> As to proof of damages, the record contains no evidence to support an award of general damages. As to this matter, plaintiff testified that he attempted to find a teaching position at other schools but was unable to do so. He did find another position with the state at a comparable or better salary. He is entitled to no damages just by reason of a change of jobs. There was no showing as to any effect resulting from the inability to find a teaching position. There was evidence that he was, in the words of the trial court,

> harassed by defendants Losee and Barnum. However, there is no pendent cause for defamation or any related cause. Many, if not all, of the incidents complained of appear to have taken place after the discharge was announced, although under the record it is difficult to determine just when the actual termination was effective. We must hold that the award of general damages was without adequate basis in the facts, and must be set aside.

In the case of *Magnett* v. *Pelletier*, 488 F. 2d 33 (1st Cir. 1973), the Circuit Court of Appeals for the First Circuit affirmed the propriety of nominal damages for a violation of civil rights where no right to compensatory damages as a result of injury had been shown. The Court directed that a "nominal" award of $500 could not be regarded as nominal damages and that if nominal damages were determined to be proper, the award should be reduced to the traditional sum of $1.00. The Court stated as follows at page 35:

> Nominal damages are a mere token, signifying that the plaintiff's rights were technically invaded even though he suffered, or could prove, no loss or damage. *Chesapeake & Potomac Tel. Co.* v. *Clay*, 1952, 90 U.S. App. D.C. 206, 194 F.2d 888; "a small or token sum awarded to a person who has been wronged but who has not shown such an injury as to be entitled to compensatory damages." Webster's Third New International Dictionary (1968). Other dictionaries use the word "trifling." E.g., Black's Law Dictionary 469 (Rev. 4th ed. 1968); Bouvier's Law Dictionary 2353 (3rd rev. 1914). If a compensable injury has been shown, compensatory damages must be given; if not, nominal damages should not be used to compensate plaintiff in any substantial manner, since he has shown no right to such compensation. We do not accept those decisions that have awarded as nominal damages more than a token amount. Five hundred dollars charged against an individual police officer is no mere token.

In another First Circuit Court case, *Cordeco Dev. Corp.* v. *Vazquez*, 539 F. 2d 256 (1st Cir. 1976), the Court of Appeals affirmed an award for $1.00 damages in an action for violation

of constitutional rights and recognized that a mere breach of a duty does not establish entitlement to general compensatory damages since liability will not suffice to prove the amount of damages and since speculative inferences in lieu of evidence are impermissible standards of evaluation. In strong language regarding damages the Court stated at page 262:

> And with respect to the amount of damages, while a plaintiff need not demonstrate the amount of damage with mathematical precision, it must provide sufficient evidence to take the amount of damages out of the realm of speculation and conjecture. As the district court properly found, plaintiff has here failed to meet that burden. (Citations omitted.)

The holding of the Seventh Circuit in the instant matter is completely contrary to these and other circuit holdings in that it would allow general compensatory damages absent individualized injury, as opposed to merely nominal damages, or a denial of damages.

Other Circuit Courts of Appeals have recognized a right to recover general compensatory damages where some intangible injury such as mental distress and humiliation is shown, but in contrast to the Circuit Court of Appeals for the Seventh Circuit, would only give nominal damages absent a showing of the individualized injury or pecuniary loss.

In affirming an award of $1.00 nominal damages in a housing discrimination case, the Court of Appeals for the Second Circuit, in *Fort* v. *White*, 530 F. 2d 1113 (2nd Cir. 1976), refused to consider general compensatory damages and stated at page 1116:

> Here there was not only no proof of humiliation but the complaint, while seeking actual damages, makes no mention of humiliation or embarrassment. In view of the plaintiffs' waiver and the absence of any evidentiary basis which would allow the trier of fact to estimate or assess such damages, we find no error in the denial of compensatory damages.

The same circuit in the case of *Stolberg* v. *Members of Bd. of Tr. for State Col. of Conn.*, 474 F. 2d 485 (2nd Cir. 1973), allowed special compensatory damages in a wrongful dismissal, for actual out of pocket loss. General compensatory damages, such as for humiliation, distress and injury to reputation, were denied for failure of proof and being "wholly speculative."

The Third Circuit Court of Appeals recognized as early as 1965 nominal damages for violation of civil rights. In *Basista* v. *Weir*, 340 F. 2d 74 (3rd Cir. 1965) the Court stated at page 87:

> As a matter of federal common law it is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled.

In *Knuckles* v. *Prasse*, 435 F. 2d 1255 (3rd Cir. 1970), the Court of Appeals of the Third Circuit denied monetary damages even though they found violation of the Civil Rights Act.

The recognition of nominal damages and no award for general compensatory damages absent proof of individualized injury was restated by the Court of Appeals for the Third Circuit in the cases of *Paton* v. *LaPrade*, 524 F. 2d 862 (3rd Cir. 1975) and *Tyrell* v. *Speaker*, 535 F. 2d 823 (3rd Cir. 1976). In *Tyrell* v. *Speaker*, the Court reduced a nominal damage award of $500 to $1.00 stating that, "as a matter of law nominal damages may not exceed one dollar on this record."

The Circuit Courts of Appeals for the Fifth and Sixth Circuits both recognized an award of nominal damages and no general compensatory damages absent proof of individualized injury such as humiliation and embarrassment. *Schiff* v. *Williams*, 519 F. 2d 257 (5th Cir. 1975); *Sexton* v. *Gibbs*, 446 F. 2d 904 (5th Cir. 1971); *Ault* v. *Holmes, Preston* v. *Cowen*, (consol.), 506 F. 2d 288 (6th Cir. 1974).

However, in *Ault* and *Preston*, the Court of Appeals for the Sixth Circuit affirmed an award of $25.00 nominal damages to

Preston instead of the traditional $1.00 and affirmed a denial to Ault of compensatory damages. The District Court in *Ault* v. *Holmes*, 369 F. Supp. 288 (D. C. Ky. 1973) recognized the unsettled nature of awarding damages for constitutional violations, stating at page 293:

> In *Jones* v. *Rundle*, 358 F. Supp. 939, 1973 (D. C. E. D. Pa.), Judge Body held that in a civil rights action brought by prisoners, no damages should be awarded, even though a breach of constitutional rights was shown, inasmuch as the law was very unsettled in that field at the time of the constitutional violations. As the District Judge pointed out in that case, to impose liability for damages upon state wardens and other state correctional authorities in prisoner civil rights cases where the law has not been finally settled by an authoritative Supreme Court or Circuit Court decision, would discourage qualified persons from accepting such positions.

Many District Courts recognize the principle that general compensatory damages cannot be awarded absent proof of individualized injury or pecuniary loss and that in those instances the option exists to award nominal damages. *International Prisoners Union* v. *Rizzo*, 356 F. Supp. 806 (E. D. Pa. 1973); *Tracy* v. *Robbins*, 40 FRD 108 (D. C. S. C. 1966); *Bell* v. *Gayle*, 384 F. Supp. 1022 (N. D. Tex. 1974) ($1.00 for each plaintiff); *Bradley* v. *School Bd.*, 324 F. Supp. 401 (E. D. Va. 1971); *Cordova* v. *Chonko*, 315 F. Supp. 953 (N. D. Ohio 1970). (nominal damages were $.01); *Washington* v. *Official Court Stenographer*, 251 F. Supp. 945, 947 (E. D. Pa. 1966); *Callahan* v. *Sanders*, 339 F. Supp. 814 (N. D. Ala. 1971) (while recognizing some courts give nominal damages, it here refused to give 50,000 plaintiffs $1.00 each).

In *Manfredonia* v. *Barey*, 401 F. Supp. 762 (E. D. N. Y. 1975) the District Court noted that damages for violations of civil rights are necessarily "left up to the discretion of the trier of the fact in the absence of out of pocket or other loss or injury."

Finally, in *Jones* v. *Superintendent*, 370 F. Supp. 488 (W. D. Va. 1974) the District Court in realizing that a wrong may have been done awarded no damages since there was no real injury or actual damages to the plaintiff.

It is apparent that there is widespread disagreement among the Courts of Appeals as to the proper federal rules of damages surrounding civil rights violations. The Court of Appeals for the Seventh Circuit is in clear conflict with the majority decisions of other Circuit Courts by holding that general compensatory damages must be awarded as a matter of law when any violation of civil rights has been established. Petitioners believe that it is important for the Supreme Court to clarify not only whether or not the Circuit Court of Appeals for the Seventh Circuit holding should stand as the new federal rule of damages in this area, but also whether or not there can be a denial of both general compensatory damages or nominal damages by the trier of the fact.

CONCLUSION.

For the foregoing reasons the petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 76-1649

JARIUS PIPHUS, a Minor and GENEVA PIPHUS, Guardian ad Litem for Jarius Piphus,

Plaintiffs-Appellants,

vs.

JOHN D. CAREY, et al.,

Defendants-Appellees.

No. 76-1652

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, a Minor and CATHERINE BRISCO, Guardian ad Litem for Silas Brisco,

Plaintiffs-Appellants,

vs.

JOHN D. CAREY, et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 74-C-303 and 73-C-2522—George N. Leighton, *Judge.*

Argued October 18, 1976—Decided November 22, 1976

Before CLARK, *Associate Justice* (Retired),* CASTLE, *Senior Circuit Judge,* and TONE, *Circuit Judge.*

TONE, *Circuit Judge.* The District Court found that the rights of the plaintiff public school students to procedural due process

* The Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

had been violated by suspensions without hearings, and that the defense of good faith was not available to the defendant school authorities. Nevertheless, the court refused to award damages because of the lack of evidence of injury, and omitted awarding equitable or declaratory relief although acknowledging that such relief would be appropriate. We reverse, holding that damages and equitable and declaratory relief should have been granted.

The suspensions in both cases were for 20 days. One plaintiff was kept out of school for 8 days and the other for 17 days before their readmission resulting from preliminary injunction proceedings. After hearing both cases on their merits on stipulated records, the District Court held that both suspensions had been ordered without the due process guaranteed by the Fourteenth Amendment and that the defense of good faith was not available to the defendants. Inasmuch as the defendants do not question either holding on appeal,[1] the District Court's determination is conclusive on the liability issue. After finding the defendants liable, the court went on to observe that declaratory relief would be appropriate and that references to plaintiffs' suspensions should be deleted from their records. In dealing with plaintiffs' damage claim, however, the court held that, while the defendants' failure to satisfy the criteria for the defense of good faith[2] "technically" entitled plaintiffs to damages, none

1. Because the District Court dismissed the complaint, defendants were not required to cross appeal in order to challenge this determination. Had they raised the liability issue on appeal and persuaded us that it was wrongly decided, we would have been procedurally correct in affirming on that ground. *Dandridge* v. *Williams*, 397 U. S. 471, 475 n. 6 (1970).

2. The court found that, although there was no evidence that the defendants acted maliciously, and therefore the first test of *Wood* v. *Strickland*, 420 U. S. 308 (1975), was satisfied, the defendants "should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs," and therefore the second test enunciated in that decision was not met. See also *Hostrop* v. *Board of Junior College District No. 515*, 523 F. 2d 569, 577 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1748 (1976).

had been proved. The court dismissed the complaints, ordering no relief whatsoever.

Plaintiffs, in support of their damage claim, attempted to show the value of each missed day of school by submitting data on cost per pupil per day. After the court's decision, plaintiffs filed a "motion to amend the final order," in which they sought reconsideration of the damage issue. Judge McLaren, who rendered the initial decision, reopened the issue of damages, and plaintiffs then submitted data on non-resident tuition charges. Following Judge McLaren's death, the case was reassigned to Judge Leighton, who denied the post-trial motions.

The damage issue is controlled by *Hostrop* v. *Board of Junior College District No. 515*, 523 F. 2d 569 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1748 (1976). We recognized in that case that non-punitive damages for the injury which is "inherent in the nature of the wrong" are recoverable for a violation of the right to procedural due process, as they are for the deprivation of voting rights or other constitutional rights. *Id.* at 579-580. This is so even if, as in the case at bar, there is no proof of individualized injury to the plaintiff, such as mental distress (which, when found to have been suffered, would enhance the general damages recoverable), and even if no pecuniary loss is shown. The amount of the damages to be awarded when no individualized injury is shown is dependent on the nature of the wrong. The amount fixed by the District Court should be neither so small as to trivialize the right nor so large as to provide a windfall.[3]

Accordingly, the District Court erred in not allowing damages even though no individualized injury was shown by the stipulated record. The court also erred in not considering the possibility of special damages for the school days plaintiffs lost as a

3. See, *e.g.*, *Seaton* v. *Sky Realty Co.*, 491 F. 2d 634, 637 (7th Cir. 1974); *Sexton* v. *Gibbs*, 327 F. Supp. 134, 143 (N. D. Tex. 1970), *aff'd*, 446 F. 2d 904 (5th Cir. 1971), *cert. denied*, 404 U. S. 1062 (1972); *Magnett* v. *Pelletier*, 488 F. 2d 33, 35 (1st Cir. 1973).

result of their suspensions. Both in the stipulated record and in support of their post-trial motion, plaintiffs submitted data (to which no objection based on the rules of evidence appears to have been made) tending to show the pecuniary value of the time lost. These damages, however, and any others flowing from the suspension, as distinguished from the deprivation of a procedural due process right, would be recoverable only if a plaintiff's suspension would not have occurred absent the due process violation. *Cf. Hostrop, supra,* 523 F. 2d at 579. On remand, therefore, as counsel for plaintiffs recognized at oral argument, if a plaintiff seeks to recover damages flowing from his suspension, the defendants will be entitled to offer evidence showing that there was just cause for the suspension and that therefore he would have been suspended even if a proper hearing had been held. If the District Court finds that to be the case, no damages may be recovered for suspension, and only damages resulting from the deprivation of due process rights may be awarded.

Equitable relief, however, should not depend upon whether plaintiffs would have been suspended in any event. The suspension orders that were entered were invalid because of the due process violations, and the defendants have not chosen to institute a new suspension proceeding that would have afforded a basis for a valid suspension order against either plaintiff. Even though they advise us that they have expunged all reference to the invalid suspensions from the plaintiffs' records, declaratory and injunctive relief consistent with the judgment should be granted.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

PUSH, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants.

JARIUS PIPHUS, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants.

Nos. 73 C 2522 and 74 C 303 Consolidated.

MEMORANDUM OPINION AND ORDER

These consolidated cases are civil rights actions challenging the constitutionality of rules and procedures used by the Board of Education of the City of Chicago (the Board) in suspending elementary and high school students from its schools. The cases have been submitted to the Court for final adjudication on stipulated records which include certain depositions, documents, factual stipulations, and affidavits. This opinion will constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Plaintiffs in No. 73 C 2522 are Silas Brisco, a student; his mother, Catherine Brisco, and People United to Save Humanity (PUSH), a not-for-profit Illinois corporation primarily composed of minority group members.[1] Plaintiffs in No. 74 C 303

1. Defendants have challenged the standing of PUSH to be a party plaintiff in 73 C 2522. In a memorandum opinion dated June

(Continued on next page)

are Jarius Piphus, a student; and his mother, Geneva Piphus. Defendants in each action are members of the Board or agents of the Board who allegedly participated in the suspensions in question or who knew or reasonably should have known that unconstitutional suspensions would occur.

During the 1972-73 school year, Silas Brisco was enrolled in the fifth grade at Clara Barton Elementary School which is located on the southside of the City of Chicago. During this period the Barton School was in transition from a predominantly white to a predominantly black enrollment. Also during the 1972-73 school year, several black male students began to attend school wearing earrings. The principal and other school administrators believed that these earrings denoted gang membership and thus a decision was made that in the interest of student safety male students would be prohibited from wearing earrings. The district superintendent with jurisdiction over the Barton School, Steven Brown, was notified of this decision and approved of the prohibition.

Subsequent to the establishment of the earring rule, certain male students were orally informed of the existence of the earring rule and were warned that further wearing of an earring could result in a suspension. There were no other published rules in effect at the Barton School at the time the earring prohibition was adopted nor was the earring rule reduced to written form. Silas Brisco, however, had actual notice of the earring ban.

Starting in May 1973, Silas Brisco began to wear an earring to school in contravention of the rule. On one occasion in May

(Continued from preceding page)

13, 1974, this Court held that PUSH alleged facts entitling it to standing. Since then PUSH has filed an uncontroverted evidentiary affidavit which factually supports the allegations contained in the second amended complaint. PUSH therefore has established as a factual matter that it or its members have experienced specific injury in fact and come within the zone of interests to be protected. Its standing to sue has therefore been established. *Warth* v. *Seldin*, 95 S. Ct. 2197 (1975).

1973, he was told to remove the earring or face suspension. At that time he refused and was suspended for a portion of the school day until his mother conferred with District Superintendent Brown; Brisco then removed the earring and was readmitted.

When school reconvened in the fall of 1973, the earring problem reoccurred. On September 11, 1973, Brisco again wore an earring to school. During the course of the day he was called to the school office by the principal, Rudolph Jezek, and Gordon Sharp, assistant principal. They ordered Silas to remove the earring in question. Silas refused, asserting that wearing earrings did not denote gang membership, but rather was a symbol of black pride.

Following his refusal to remove the earring, Principal Jezek conferred with District Superintendent Brown, Brown informed Jezek that the earring ban was still in effect. Brisco was then informed that unless he immediately complied with the rule, he would be suspended. He continued to refuse to remove the earring.

Assistant Principal Sharp then left the immediate central office area to telephone Brisco's mother and write up a suspension report form. Mrs. Brisco then came to Barton School where a conference was held with Jezek and Sharp. Jezek informed Mrs. Brisco of the impending suspension if Silas did not comply wtih the earring rule. Mrs. Brisco supported her son's behavior and thus a 20-day suspension was imposed. Ultimately, Brisco served 17 days of the suspension; he was voluntarily readmitted while a motion for preliminary injunction was pending before this Court. In sum, at no time before or after Silas' suspension did an independent observer hear evidence with respect to the factual issue of what the wearing of an earring actually denoted.

The facts surrounding the suspension of Jarius Piphus are equally straightforward. During the 1973-74 school year he was a student at Chicago Vocational High School (CVS). The rules

of CVS prevented cigarette smoking and bringing intoxicating substances onto school property. Jarius had actual notice of these rules. On January 13, 1974 defendant Reginald Brown, principal of CVS, observed plaintiff and another student passing an irregularly shaped cigarette between them. At that time Piphus was on school property, near the school parking lot. As Brown approached Piphus, he smelled smoke which he believed to be the odor of marijuana. Mr. Brown also observed Piphus attempting to pass cigarette papers to the other student. Cigarette papers can be used for preparing marijuana cigarettes. When the boys saw Mr. Brown they discarded the cigarette. The object may have been thrown into nearby hedges or discarded on the way to the school office. No attempt was made to recover the object although Piphus has consistently denied that he was smoking marijuana.

Despite the denial, Mr. Brown accompanied Piphus and the other student to the school's disciplinary office and there told the assistant principal to follow the "usual procedure" imposing a 20-day suspension for violation of the rule against smoking marijuana. Piphus was then formally suspended by the assistant principal, although Principal Brown admits that it was his decision to suspend him.

Subsequently, two meetings were held between school officials, Piphus, his mother, sister, and legal representatives from the Mandel Legal Aid Clinic. These meetings were not fact finding hearings but rather were for the purpose of explaining actions previously taken. At the second of these meetings, the Mandel representatives were excluded when they attempted to tape-record the proceedings. Thereafter, Piphus' suspension was reduced to five days by the District Superintendent. At the same time, Judge Bauer entered a temporary restraining order readmitting plaintiff. As a result of the incident in question, Piphus missed eight days of classes.

Two legal issues have been raised by the above-described suspensions: (1) whether students were given sufficient prior

notice of conduct which was prohibited, and (2) whether adequate hearings were held at the time Brisco and Piphus were suspended.

At the time of the incidents in question the Board rule governing suspensions read as follows:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Each such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statements of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil." Rule 6-9 of the Rules of the Board of Education of the City of Chicago (1973).

Plaintiffs argue that the language "gross disobedience or misconduct" is unconstitutionally broad and vague, particularly in an arguably First Amendment context such as the Brisco case. Were the "gross disobedience or misconduct" language the sole notice given to forewarn a student of forbidden conduct, the Court would agree with plaintiffs. See *Soglin* v. *Kauffman,* 418 F. 2d 163 (7th Cir. 1969); *Linwood* v. *City of Peoria,* 463 F. 2d 763 (7th Cir. 1972). However, both students here were given actual notice of reasonably narrow regulations which gave specific meaning to the terms in dispute. *Linwood* demonstrates that this type of procedure is constitutionally sufficient. In *Linwood* the court stated the language "gross disobedience or misconduct"—

> "does not purport to define or proscribe specific acts or omissions which may be penalized by suspension or expulsion. But it does furnish the local school authority with a general guideline or standard—that student disobedience or misconduct must be 'gross' to justify its being made a ground for suspension or expulsion." 463 F. 2d at 768.

Thus, the gross disobedience language was not intended to be a self-executing regulation of student conduct but rather was

intended to be a generalized grant of power exercised by instituting more specific regulations. Here such specific regulations were promulgated by the individual schools involved, providing adequate actual notice of forbidden conduct.[2]

Plaintiffs also argue that Brisco and Piphus were not accorded sufficient hearings to test the evidentiary basis for their suspensions. In *Goss* v. *Lopez*, 95 S. Ct. 729 (1975), the Supreme Court held that students who were temporarily suspended from publicly supported schools were entitled to hearings which comport with minimal requirements of due process (an informal hearing).[3] Unless the student's presence poses a con-

2. Plaintiffs properly note that the Board has failed to issue one generalized set of specific narrowing regulations, nor has the Board required each school to issue appropriate regulations. As a consequence, some schools have no such formal regulations while other schools promulgate regulations on an *ad hoc* or word-of-mouth basis, while yet other schools have a quite formal set of written regulations. Despite this range of behavior, the Court has not been presented with any evidence of specific suspensions of students from schools without any narrowing regulations. Because educational discipline presents problems not easily resolved by constitutional judicial inquiry, until such a case is presented in a complete factual context, this Court expresses no view as to what type of remedy would be appropriate in such a case.

3. After *Goss* was decided the Board revised its suspension practices. Rule 6-9 now reads:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding . . . ten school days for each offense. Every such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such susupension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil.
>
> "Prior to a suspension of 10 days or less the student shall be given oral or written notice of the charges against him and an informal hearing with an explanation of the basis of the charge and an opportunity to explain his version of the facts. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and informal hearing should follow as soon as practicable."

(Continued on next page)

tinuing danger to persons or property or an ongoing threat of disrupting the academic process, the hearing should be held before a suspension is imposed. The Court also stated that suspensions in excess of 10 days, expulsions, or unusual circumstances may warrant more formal hearings. Here both suspensions potentially exceeded 10 days, triggering the need for more formal procedures. Additionally, the first amendment implication of the Brisco case also warrants stricter procedural

(Continued from preceding page)

The following guidelines were also adopted:

> "1. No student shall be suspended from school without using the authorized procedures. Every suspension shall be reported immediately to the District Superintendent using the appropriate forms and also reported to the parent or guardian of the pupil with a full statement of the reasons for the suspension.
>
> "2. A student facing suspension of ten days or less shall be given oral or written notice of the charges against him and an informal hearing arranged by the principal. At the hearing, the student will be given an explanation of the basis of the charges as well as an opportunity to present his version of the facts.
>
> "3. A student facing suspension may request that a third party—such as a parent, school staff member or another student be present during the informal hearing.
>
> "4. In those cases where a student's presence poses a continuous danger to persons or property or is an ongoing threat of disrupting the academic process, the student may be immediately removed from school. In such cases the necessary notice and informal hearing should follow as soon as practicable.
>
> "5. Every effort should be made to ensure the student's receipt of class assignments for the period of the suspension. The academic grade of a suspended student will not be affected when class assignments are completed satisfactorily in keeping with standards applicable to all students set by the student's teacher. Teachers have the further option of testing pupils upon their return to class on the work submitted."

For the reasons stated in footnote 2, the Court believes that the constitutionality of these new regulations cannot be tested until a full factual background is developed. Moreover, the parties have failed to demonstrate that a true case or controversy presently exists with respect to these rules. This Court therefore should not render an essentially advisory opinion on the constitutionality of the rules.

standards before a suspension can be imposed. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969).

This Court's prior opinion in *Quintanilla* v. *Carey*, 75 C 829 (N. D. Ill. March 31, 1975) sets out the basic contours of a formal school disciplinary hearing:

> (1) the student should be given a prehearing notice of the specific charges against him, including a short summary of the evidence the school administrator intends to rely upon;
>
> (2) the student should have the right to be represented by counsel (or another responsible advocate) at the hearing;
>
> (3) the student should be able to present witnesses on his behalf and cross-examine witnesses;
>
> (4) the student, at his expense, should be able to make a tape recording or transcript of the hearing;
>
> (5) an impartial hearing officer should preside generally. This would preclude a witness from serving as the hearing officer and, in some instances, a school administrator not from the same school as the accused student would be necessary.

See also *Mills* v. *Board of Education of Dist. of Columbia*, 348 F. Supp. 866, 880-84 (D. D. C. 1972); *Vail* v. *Board of Education of Portsmouth School Dist.*, 354 F. Supp. 592, 603-604 (D. N. H. 1973).*

Measured against these generalized requirements it is apparent that both Brisco and Piphus failed to receive adequate disciplinary hearings. The decisions to suspend both of them were made by their major factual accusers. Neither was afforded an opportunity to present evidence in his behalf at a meaningful time and in a meaningful manner. Any conferences with respect to the suspensions in question were held after an administrative decision had already been made. Piphus' attorneys were excluded from his post-suspension conference and he was not permitted to make a tape recording of the conference.

Since plaintiffs have established that unconstitutional suspensions occurred, we must consider the form of relief to be provided. Undoubtedly plaintiffs are entitled to a declaration that the suspensions in question were unconstitutional. Plaintiffs' school records should be corrected, deleting any reference to these suspensions. Plaintiffs have also asked for an award of actual and punitive money damages. A recent Supreme Court and several recent Seventh Circuit opinions set forth the standard for measuring whether monetary liability is appropriate. *Wood* v. *Strickland*, 95 S. Ct. 992 (1975); *Minns* v. *Board of Education*, No. 74-1534 (7th Cir. Sept. 24, 1975); *Hostrop* v. *Board of Junior College Dist. No. 515*, No. 74-1915 (7th Cir. Sept. 24, 1975). An official is immune by reason of good faith for liability for damages for a constitutional violation if he is:

> "acting, not with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff], but 'sincerely and with a belief that he is doing right.' Second, if he meets the first test, he is liable only 'if he knew or reasonably should have known' that his act 'would violate the constitutional rights of the plaintiff' " *Hostrop, supra*, Slip Op. p. 10, quoting *Wood, supra*, 95 S. Ct. at 1001.

Here the record is barren of evidence suggesting that any of the defendants acted maliciously in enforcing disciplinary policies against the plaintiffs. Undoubtedly defendants believed that they were protecting the integrity of the educational process. With respect to the second element of the *Wood* test, it is apparent that shorter suspensions as contemplated by *Goss* might raise the defense that defendants are not "charged with predicting the future course of constitutional law" and thus cannot be held responsible for the legal developments anticipated in *Goss*. The initial length of suspensions imposed in the instant case seems to indicate, however, that under the *Linwood* rationale, defendants should have known that plaintiffs were entitled to some type of adjudicative hearing. The potential 20-day length

of the suspensions was more analogous to an expulsion than a *Goss*-type suspension. Defendants should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs. Technically, therefore, plaintiffs should be entitled to damages.

However, damages must be proved with at least a reasonable degree of certainty. *Hoefferle Truck Sales Inc.* v. *Divco-Wayne Corp.*, 74-1481 (7th Cir. Oct. 6, 1975); *Classic Bowl, Inc.* v. *AMF Pinspotters, Inc.*, 403 F. 2d 463 (7th Cir. 1968). Plaintiffs put no evidence in the record to quantify their damages, and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof. Accordingly, the complaints are dismissed.

IT IS SO ORDERED.

ENTERED:

/s/ R. W. MCLAREN,
United States District Judge.

Dated: November 5, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1977
CERTIORARI GRANTED APRIL 18, 1977.

INDEX TO APPENDIX.

* At Page A5 of Petition for Writ of Certiorari.

** At Page A1 of Petition for Writ of Certiorari. The opinion is also reported at 545 F. 2d 30 (7th Cir. 1976).

APPENDIX

RELEVANT DOCKET ENTRIES

IN JARIUS PIPHUS, ETC. vs. JOHN D. CAREY, ETC. (74 C 303)

2/ 1/74	Filed Complaint.
2/ 1/74	Filed motion for temporary restraining order and/or preliminary injunction.
2/ 1/74	Temporary restraining order granted for period of 10 days.
7/10/74	Filed defendants answer.
5/21/75	Enter order dated May 19, 1975 cause to be submitted on stipulated record.
6 30/75	Filed plaintiffs' motion for judgment on stipulated record.
9/12/75	Filed plaintiff reply memorandum in support of motion for judgment on stipulated record.
11/ 7/75	Enter memorandum opinion and order (Judge McLaren) dated 11-5-75.
11/21/75	Filed plaintiffs' joint motion to amend final order.
12/ 3/75	Filed plaintiffs' memorandum in support of motion to amend final order.
3/15/76	Enter order dated March 5, 1976 assigning cause to Honorable Judge Leighton
5/ 4/76	Enter order dated April 30, 1976 denying plaintiffs' joint motion to amend Judge McLaren's Memorandum Opinion and Order.
5/28/76	Filed plaintiff's notice of appeal.

RELEVANT DOCKET ENTRIES

IN PEOPLE UNITED TO SAVE HUMANITY, ETC. vs. JOHN D. CAREY, ETC. (73 C 2522)

10/ 2/73	Filed complaint.
10/ 4/73	Filed motion for temporary restraining order and/or preliminary injunction.
11/12/73	Filed plaintiffs' second amended complaint.
12/21/73	Filed plaintiffs' motion for determination of a class.
1/ 3/74	Temporary restraining order and preliminary injunction denied.
2/ 4/74	Filed suggestion of death upon the record of defendant Rudolph Jezik, Jr.
6/18/74	Enter order dated June 13, 1974 granting motion of Bakalis of dismissal, denying motion of defendants' Board of Education of the City of Chicago to dismiss, denying motion of plaintiffs' for certification of the class, denying motion challenging standing of P. U. S. H.
8/ 8/74	Filed defendants' answer to second amended complant.
5/21/75	Enter order dated May 19, 1975, cause to be submitted on stipulated record.
11/ 6/75	Enter memorandum opinion and order of Judge McLaren dated 11-5-75.
11/17/75	Filed plaintiffs' motion for suggestion of Silas Brisco and P. U. S. H. in support of plaintiffs motion to amend final order.
11/21/75	Filed plaintiffs' joint motion to amend final order.
12/ 3/75	Filed plaintiffs' memorandum in support of motion to amend final order.

3/ 9/76	Enter order dated March 5, 1976 reassigning case to Judge Leighton.
5/ 3/76	Enter order dated April 30, 1976 denying plaintiffs' joint motion to amend Judge McLaren's Memorandum Opinion and Order.
5/28/76	Filed plaintiffs' notice of appeal.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

JARIUS PIPHUS, a minor, and GENEVA PIPHUS, guardian ad litem for JARIUS PIPHUS,

Plaintiffs,

vs.

JOHN D. CAREY; CAREY PRESTON; GERALD SBARBARO; ALVIN BOUTTEE; MARIA CERDA; BERNARD FRIEDMAN; LOUISE MALLIS; THOMAS NAYDER; MARGARET WILD; MRS. WILLIAM ROHTER; JAMES F. REDMOND; individually and in his official capacity as General Superintendent of Schools; REGINALD V. BROWN, individually and in his official capacity as Principal of Chicago Vocational High School,

Defendants.

74 C 303

COMPLAINT

Count 1

1. This is a civil action for declaratory and injunctive relief and for damages for violation of the Constitution and laws of the United States. Plaintiff seeks a declaration that the actions of defendant school officials in suspending him from school without notice, without a hearing and pursuant to no published rules of procedure violates his right to procedural due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution.

2. Jurisdiction is based on 28 U. S. C. §§ 1343 and 1344 and 42 U. S. C. § 1983 and arises under the Fourteenth Amendment to the United States Constitution. Declaratory relief is authorized by 28 U. S. C. §§ 2201 and 2202 and Rule 57, F. R. C. P.

3. Plaintiff Jarius Piphus is a 14-year-old male residing in the City of Chicago who is presently enrolled at Chicago Vocational High School in Chicago, Illinois. Geneva Piphus is the mother of Jarius Piphus and is serving as next friend and guardian ad litem for purpose of this action.

4. Defendants John D. Carey, Carey B. Preston, Gerald Sbarbaro, Alvin Boutte, Maria Cerda, Bernard Friedman, Louise Malis, Thomas Nayder, Margaret Wild and Mrs. William Rohter are members of the Board of Education of the City of Chicago and are charged with the responsibility of administration of the public schools within Chicago pursuant to Chapter 122, Section 34-19, Ill. Rev. Stat., and are empowered to oversee the disciplining of pupils.

5. Defendant James F. Redmond is the General Superintendent of Schools of the City of Chicago and as such is the chief administrative officer of the school board of the City of Chicago responsible for the administration of the public schools and the overseeing of the disciplinary process.

6. Reginald V. Brown is a principal of Chicago Vocational High School in the City of Chicago. Defendant Reginald Brown is responsible for the administration of discipline and the suspension of students in Chicago Vocational High School and is the individual who both accused plaintiff of certain acts of misconduct and authorized the suspension of plaintiff from school.

7. On January 23, 1974, while plaintiff was walking with a classmate from a class that was just completed to a class about to begin on the premises of Chicago Vocational High School (CVS), he was accused by the principal of CVS, defendant Reginald Brown, of smoking a cigarette containing marijuana.

Plaintiff and his classmate had been sharing a "Kool" brand cigarette.

8. Although plaintiff immediately denied having smoked any marijuana whatever and there was no evidence of his having smoked any marijuana whatever, the defendant Reginald Brown took plaintiff to the office of Mr. Kimbrough, who handles boys' discipline for CVS. There plaintiff emptied his pockets of their contents, which did not include a cigarette, marijuana or any other manner of illicit substance. His classmate took from his pocket a package of "Kool" brand cigarettes in the presence of Mr. Kimbrough.

9. Plaintiff then was told to sit outside of his office from 9:30 A.M. to 4:00 P.M. which plaintiff did with the exception of one half hour for the lunch period, which Mr. Kimbrough gave plaintiff permission to attend.

10. At 4:00 P. M. on January 23, 1974, Mr. Kimbrough told plaintiff he was suspended for twenty days. Neither plaintiff nor his mother has received any other notice, written or oral, of plaintiff's suspension or of the reasons therefore.

11. On January 28, 1974, David Young, representing plaintiff, repeatedly attempted to contact the District 16 superintendent without success. On the afternoon of January 28, 1974, Ms. Grace Dawson, Human Relations Coordinator for District 16 called Mr. Young.

12. When Mr. Young requested reinstatement of plaintiff and a hearing on the matter of his suspension, Ms. Dawson told him that plaintiff was not entitled to a hearing under the regulations of the Chicago Board of Education.

13. On Wednesday, January 30, 1974, plaintiff, plaintiff's mother and sister, John Elson and David Young of the Mandel Legal Aid Clinic, went to a conference at the school set up by Ms. Dawson. She and Mr. Reginald Brown attended.

14. When Mr. Elson said he would record the proceeding and then turned on a tape recorder to do so, Mr. Brown seized

the recorder, turned it off, and told Mr. Elson and Mr. Young to leave his office. Mr. Elson objected, but said he would not use the tape recorder (under protest). Mr. Elson asked for the proceeding to commence. However, Mr. Brown still refused to allow Mr. Elson or Mr. Young to remain in the room.

15. Defendants' actions in suspending plaintiff from school violates the United States Constitution's Fourteenth Amendment guarantee of due process of law in that they deprived him of substantial personal interests, including twenty days of high school education, a fair opportunity to pass his courses and graduate from high school, and a discipline-free high school record, without allowing him a chance to present a defense to the charges against him.

16. Defendants violated plaintiff's right to procedural due process of law by the following specific acts:

a. punishing him without giving him or his parents written notice of the charges against him;

b. punishing him without giving him notice of his opportunity for a hearing;

c. punishing him without giving him a prior hearing with the following procedural rights:

   1. that of a record made of the proceedings;
   2. that of a decision by a impartial hearing officer;
   3. that of a written decision with a statement of reasons;
   4. that of meaningful and objective review of the decision of the hearing officer;
   5. and that of the opportunity to be represented by counsel;

d. punishing him without reference to any procedural rules.

Plaintiff is now being denied by defendants fundamental civil rights and is thereby being caused irreparable injury for which there is no adequate remedy at law.

WHEREFORE, Plaintiff prays that this Court:

1. preliminarily and permanently enjoin defendants from suspending plaintiff from school unless they first provide him with the aforesaid procedural safeguards required by the Fourteenth Amendment to the United States Constitution;

2. permanently order that all records of the suspension complained of herein be expunged from his school record;

3. preliminarily and permanently order defendants to provide tutors to enable plaintiff to make up work he missed as a result of the suspension;

4. preliminarily and permanently enjoin defendants from punishing plaintiff in any way for the actions complained of herein;

5. declare Illinois Revised Statutes, ch. 122 § 34-19 and Ch. VI, § 6, Art. 9 of the Rules of the Chicago Board of Education to be unconstitutional and void on their faces and/or as applied;

6. award $3,000 actual and punitive damages; and grant plaintiff his costs and attorney's fees; and

7. award any other relief which is necessary and just under the circumstances.

JOHN ELSON
Attorney for Plaintiff

JOHN ELSON
Mandel Legal Aid Clinic
6020 S. University Ave.
Chicago, Illinois 60637
FA 4 5181
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
* * (Title Omitted in Printing—74-C-303) * *

ANSWER

Now come the defendants John D. Carey, Carey Preston, Gerald Sbarboro, Alvin Bouttee, Maria Cerda, Bernard Friedman, Louise Malis, Thomas Nayder, Margaret Wild, Mrs. William Rohter, James F. Redmond and Reginald V. Brown, through their Attorney, Michael J. Murray, and in answer to the Complaint state as follows:

1. Defendants admit that the alleged claim is a civil action for declaratory judgment and injunctive relief, but deny that the actions of the school officials violated plaintiff's right to procedural due process of law or any right whatsoever.

2. Defendants admit the allegations of paragraph 2.

3. Defendants admit the allegations of paragraph 3.

4. Defendants admit the allegations of paragraph 4 except defendants deny that Alvin Boutte is a member of the Board of Education of the City of Chicago.

5. Defendants admit the allegations of paragraph 5.

6. Defendants admit the allegations of paragraph 6.

7. Defendants deny that plaintiff was walking to class, and state further that plaintiff was standing outside the school exit smoking. Defendants admit that plaintiff was seen smoking a marijuana cigarette.

8. Defendants admit the allegations of paragraph 8, but deny that no evidence was present of plaintiff having smoked marijuana.

9. Defendants state that plaintiff sat in the discipline office from 9:30 A.M. to 4:00 P.M. Defendants further state that repeated attempts were made to contact the parent of plaintiff and that defendant Brown and Mr. Kimbrough, Director of

Discipline at Chicago Vocational High School received no co-operation from plaintiff Jarius Piphus in attempting to contact his parent.

10. Defendants admit that plaintiff Jarius Piphus was suspended for 20 days. Defendants deny the further allegation of paragraph 10.

11. Defendants admit that Mrs. Grace Dawson, Human Relations Coordinator for District 16 contacted Mr. Young. Defendants further state they do not have sufficient information to form a belief as to the truth of the further allegation of paragraph 11, and, therefore, deny the same.

12. Defendants deny the allegations of paragraph 12.

13. Defendants admit the allegations of paragraph 13.

14-16. Defendants deny the allegations of paragraphs 14 through 16.

WHEREFORE, defendants pray that this Court deny the plaintiffs their relief prayed for in the Complaint and ask this Court for reasonable costs and attorneys fees.

/s/ MICHAEL J. MURRAY
Michael J. Murray
Attorney

STANLEY A. STRZELECKI, JR.
Assistant Attorney
228 North LaSalle Street
Chicago, Illinois 60601
641-3900

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

PEOPLE UNITED TO SAVE HUMANITY; SILAS BRISCO, individually and on behalf of all others similarly situated, CATHERINE BRISCO, guardian ad litem, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

JOHN D. CAREY; CAREY PRESTON; GERALD SBARBARO; ALVIN BOUTTEE; MARIA CERTA; BERNARD FRIEDMAN; LOUISE MALLIS; THOMAS NAYDER; MARGARET WILD; JAMES F. REDMOND, individually and in his official capacity as General Superintendent of Schools; RUDOLPH JEZIK, JR., individually and in his official capacity as Principal of Barton Public School; MICHAEL J. BAKALIS, individually and in his official capacity as Illinois Superintendent of Public Instruction,
Defendants.

No. 73 C 2522

SECOND AMENDED COMPLAINT

Count I

1. This is a civil action for declaratory and injunctive relief and for damages for violation of the constitution and laws of the United States. Plaintiffs, individually and on behalf of all others similarly situated, seek a declaration that the actions of

defendant school officials in suspending a male student for wearing a small earring in one ear without a proper hearing and pursuant to un-published rules and regulations violate the plaintiff's right to procedural due process of law, guaranteed by the First and Fourteenth Amendments to the United States Constitution and the right to be free from arbitrary and unreasonable suspensions and expulsions.

2. Jurisdiction is based on 28 U. S. C. §§ 1343 and 1344 and 42 U. S. C. § 1983 and arises under the First and Fourteenth Amendments to the United States Constitution. Declaratory relief is authorized by 28 U. S. C. §§ 2201 and 2202 and Rule 57, F. R. C. P.

3. People United to Save Humanity (PUSH) is an Illinois religious corporation organized under the laws of the State of Illinois founded to establish, promote and perpetuate a true ecumenicity within and among God's people on earth; to formulate, structure and implement programs directed toward the religious, moral, ethical, cultural, civic, educational, and economic regeneration, development, and redevelopment of its own members, associates, and the community at large; with emphasis upon the advancement of the constitutional, economic, and civil rights of minority persons; to promote and advance the philosophy and principles of nonviolence and nonviolent direct action as espoused and practices by the late Dr. Martin Luther King, Jr.; to engage in research, citizen education, voter education, and registration; conduct religious and educational conferences and symposiums; publish educational materials; to promote justice, equality, cultural harmony, and cooperation among multi-racial groups throughout the world; to own, buy, sell, lease, and otherwise deal in real estate in pursuit of nonprofit objectives of the organization, and to do all things necessary and proper to carry out the foregoing purposes. PUSH's membership includes parents of students and students in full-time attendance in the Chicago public schools who are thereby subject to the actions and practices complained of here pursuant to the

applicable statutes and rules. PUSH, both with regards to its own membership and other minority group persons, has been active in encouraging their educational development through various programs and has been active in attempting to secure their civil rights and in defending them in the public schools against suspensions, transfers and expulsions under the statutes and rules complained of herein.

4. The named plaintiff Silas Brisco is a 13 year old male residing in the City of Chicago who is presently enrolled at Barton Elementary School in Chicago, Illinois. Catherine Brisco is the mother of Silas Brisco and is serving as next friend and guardian ad litem for purposes of this action. Plaintiffs Catherine and Silas Brisco are PUSH members.

5. Silas Brisco and Catherine Brisco bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, individually and on behalf of all other persons who have been or will be suspended or expelled from full-time public school attendance in the City of Chicago under the statutes and rules complained of herein without (a) adequate notice to them and their parents of the charges against them, (b) a reasonable opportunity to prepare for a hearing on those charges, (c) a hearing and a fair, impartial decision on those charges, and (d) published rules which are lawful and reasonable pursuant to which charges are brought. The class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class. In addition, the defendants and their agents have acted on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

6. Defendants John D. Carey, Cary B. Preston, Gerald Sbarbaro, Alvin Boutte, Margaret Cerda, Bernard Friedman, Louise Malis, Thomas Nayder, and Margaret Wild are members

of the Board of Education of the City of Chicago and are charged with the responsibility of administration of the public schools within Chicago pursuant to Chapter 122, Section 34-19, Ill. Rev. Stat., and are empowered to oversee the disciplining of pupils.

7. Defendant James F. Redmond is the General Superintendent of Schools of the City of Chicago and as such is the chief administrative officer of the school board of the City of Chicago responsible for the administration of the public schools and the overseeing of the disciplinary process.

8. Rudolph Jezik, Jr., is a principal of Barton School located near 77th and Wolcott in the City of Chicago. Defendant Jezik is responsible for the administration of discipline and the expulsion and suspension of all students in Barton School.

9. Up to and including September 11, 1973, plaintiff Silas Brisco, who was duly enrolled as a full-time regular student in the 6th grade at Barton Elementary School in the Chicago Public School System, wore a small earring in his right ear chosen as a symbol of his pride in being a black person. During that period of time, he was asked on several occasions by defendant Jezik and his agents to remove the earring which plaintiff refused to do.

10. On September 11, 1973, subsequent to arriving at school in the morning, Plaintiff Silas Brisco was called into the school office by Defendant Jezik and Assistant Principal Shark and told to remove the earring or he would be suspended, because the earring was a symbol of membership in a gang.

11. Plaintiff Silas Brisco declined to remove the earring stating that he regarded it as a symbol of black unity. Assistant Principal Shark then asked Mr. Jezik if there was an earring prohibition still in effect and Defendant Jezik said there was; Defendant Jezik further said he would suspend plaintiff Brisco from school if the earring were not removed immediately.

12. Plaintiff Silas Brisco persisted in his refusal to remove the earring and Assistant Principal Shark then left the immediate area apparently for the purpose of telephoning Silas Brisco's mother and for the purpose of writing up the report of suspension.

13. Shortly thereafter Plaintiff Catherine Brisco received a phone call at her from defendants requesting her to appear at the school immediately because of a problem with her son Silas.

14. Plaintiff Catherine Brisco promptly went to the school where she was informed by Defendant Jezik that Silas would be suspended from school if he did not remove the earring from his ear. Plaintiff Catherine Brisco informed Defendant Jezik that she had no objections to her son wearing the earring if he wished because she believed it was a suitable expression of black solidarity.

15. Defendant Jezik thereupon completed a "Report of Suspension" which he delivered to Plaintiff Catherine Brisco which stated, *inter alia*, as follows:

> "In accordance with the provisions of rules of the Board of Education, Silas Brisco, a student in this school . . . age 13, grade 6, room 308, teacher Mr. Barber, has been suspended from school this day for a period of twenty days, at the end of the close of the day on 10-9-73 or when a parent comes to school . . . [T]he cause of the suspension is: Silas was requested to remove his earring by the principal. He refused and his mother supported him in this. The fact that he would receive a suspension was explained to the District Superintendent and approved by him last semester. You are invited to discuss the matter of this suspension with me at a mutually convenient time. Sincerely yours, /s/ Rudolph Jezik, Jr. Principal." (Ex. A)

16. At no time prior to Plaintiff Catherine Brisco's arrival at school on September 11, 1973, was Plaintiff Silas Brisco or his mother given (a) adequate notice of the charges against him and informed of the disciplinary sanctions of removal from full-time school attendance that day, (b) reasonable opportunity to prepare for a hearing on those charges, (c) a hearing at

which the burden of proof was on the defendants to show plaintiff Silas Brisco had created a material disruption, (d) an impartial decision on the charges, and (e) notice of a promulgated rule on which the charges were based.

17. Plaintiff's present suspension was preceded by a previous suspension last semester for the same reason also without a hearing. At that time Plaintiffs Silas Brisco was informed he was being suspended from school for wearing a small earring in his right ear because the earring was regarded by defendants as a symbol of gang membership. Immediately after being informed of the suspension of September 11, 1973, Plaintiff Catherine Brisco sought the assistance of Plaintiff PUSH who advised her as to where she could seek legal assistance in this matter.

18. The current suspension was imposed pursuant to Ill. Rev. Stat., Ch. 122 §§ 34-1, 34-8, and 34-19, which provide that "[T]he general superintendent of schools shall prescribe and control, subject to the approval of the board . . . discipline in . . . the schools . . ." Further, the board shall establish rules "for proper maintenance of a uniform system of discipline . . . It may expel, suspend, or otherwise discipline any pupil found guilty of gross disobedience, misconduct, or other violation of the . . . rules. . . ."

19. The suspension was further imposed pursuant to the rule of the Chicago Board of Education which states as follows:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil." (Ch. VI, Art. 9, Rules and Regulations, Bd. of Educ.)

20. Defendants' action to suspend Plaintiff Silas Brisco from school violates the First and Fourteenth Amendments to the United States Constitution in that he is being and has been threatened with being (a) punished pursuant to a Board of Education rule and State statute which are invalid on their faces and as applied; (b) punished for his opinions and beliefs; (c) punished without reference to promulgated rules and regulations; (d) denied a proper hearing prior to the punishment which includes adequate prior notice of charges, and opportunity to prepare for a hearing, a proceeding in which the burden of proof is on the school board to show a material disruption has occurred; (e) denied a fair and impartial decision; (f) treated differently from other pupils in the school; (g) punished arbitrarily without reasonable basis; and (h) denied access to public education. Such punishment is arbitrary and improper in violation of the First and Fourteenth Amendments to the United States Constitution.

21. The suspension of Plaintiff Silas Brisco interferes with his education in the public schools by preventing him from keeping pace with the instruction given to the rest of his class at school. Plaintiff Brisco's education is threatened with further interference in that plaintiff will again be suspended for failure to remove the earring when he returns to school. The suspension of Plaintiff Silas Brisco, individually and as representative of his class, interferes with the activities and goals of PUSH and its membership by virtue of Plaintiff's membership in PUSH and by virtue of its hampering plaintiff PUSH in its defense of its membership from improper interference with their education and its efforts to further education among its membership and persons belonging to minority groups.

22. Plaintiffs are presently being subjected to a denial of fundamental civil rights for which there is no adequate remedy at law in that they are presently being denied their right to a public education and threatened with a repetition of that denial in the future.

23. Defendants are engaged in a widespread pattern of long-term suspensions and expulsions of Chicago public school students without (a) published rules, (b) notices of charges and an opportunity to prepare for a hearing, (c) a hearing in which the burden of proof is on the defendants to show a material disruption has occurred, and (d) a fair and impartial decision. Such suspensions and expulsions have occurred in the past and will continue to occur in the future. A return of Plaintiff Silas Brisco to classes will not remedy the effects of this pattern which is likely and capable of repetition in the future.

WHEREFORE, Plaintiffs pray that this Court:

1. Declare Ill. Rev. Stat., Ch. 122 § 34-19 and Ch. VI, § 6, Art. 9, of the Rules of the Chicago Board of Education to be unconstitutional and void on their faces and/or as applied;

2. Preliminary and permanently enjoin defendants from suspending or expelling Plaintiff Silas Brisco from attending school without a proper hearing and pursuant to any prohibition against his wearing an earring;

3. Permanently order that all records of the suspensions and other punishment complained of herein be expunged from his school record;

4. Preliminarily and permanently order defendants to provide tutors to enable Plaintiff Silas Brisco to make up work missed as a result of the suspension;

5. Preliminarily and permanently enjoin defendants from punishing individual plaintiffs or members of the class which they represent in any way for the actions complained of herein;

6. Award $5,000.00 actual and punitive damages; and

7. Award any other relief which is necessary and just under the circumstances.

Count II

1-4. Plaintiffs incorporate by reference paragraphs 1-4 of Count I as paragraphs 1-4 herein.

5. Plaintiffs Silas and Catherine Brisco bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, individually and on behalf of all other persons in the City of Chicago who are full-time public school students. The class is so numerous that joinder of all members is impractical, there are questions of law and fact common to the class, the representative parties will fairly and adequately protect the interest of the class. In addition, the Defendants and their agents have acted on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

5A. Defendant Michael J. Bakalis is the Illinois Superintendent of Public Instruction and as such is the chief administrative officer of the State of Illinois responsible for the administration of the public schools throughout the state. He maintains an office in Chicago, Illinois.

6-17. Plaintiffs incorporate by reference paragraphs 6-17 of Count I as paragraphs 6-17 herein.

18. As full-time public school students in the City of Chicago, Silas Brisco and members of his class are subject to Article 34 of the School Code (Ill. Rev. Stat., Ch. 122, § 34) and to the authority of defendants in connection with discipline in the schools.

19. Students in all Illinois school districts other than that of the City of Chicago are entitled to the procedural protection in Illinois Revised Statutes, Ch. 122, § 10-22.6 prior to their being expelled or suspended from school, which includes notice and hearing prior to long term suspension or expulsion.

20. Plaintiff Silas Brisco and members of his class are under the jurisdiction of defendants herein whose disciplinary

procedures are governed by Ill. Rev. Stat., Ch. 122 §§ 34-8, 34-19. Pursuant to these provisions the defendants have failed to promulgate and Defendant Bakalis has failed to require the promulgation of procedural safeguards comparable to those afforded by Ill. Rev. Stat., Ch. 122, § 10-22.6 in connection with the suspension or expulsion of public school students.

21. Defendants' suspension and expulsion of Silas Brisco and members of his class have not proceeded and will not proceed in the future in accordance with procedures comparable to those provided for in Ill. Rev. Stat., Ch. 122, § 10-22.6.

22. Defendants' failure to promulgate and Defendant Bakalis' failure to require the promulgation of rules and regulations setting forth procedures comparable with those provided for under Illinois Revised Statutes, Chap. 122, § 10-22.6 is violative of Plaintiffs' Constitutional rights in that such omission denies Plaintiffs and the class equal protection of the laws.

23. Plaintiffs have no adequate remedy at law for the omissions complained of herein.

WHEREFORE, plaintiffs pray that this Court:

1. Declare that the policy of the defendants in suspending and expelling students from school for disciplinary reasons without providing the procedural safeguards provided for by Ill. Rev. Stat., Ch. 122, § 10-22.6 is contrary to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Enter a preliminary and permanent injunction against defendants and their agents enjoining them from suspending or expelling any student for disciplinary reasons, unless said students are given the procedural safeguards outlined in Ill. Rev. Stat., Ch. 122, § 10-22.6.

3. Award Plaintiff Silas Brisco actual and punitive damages in the amount of $5,000.

4. Grant plaintiffs their costs and such additional relief as this court deems necesary and just.

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IN THE UNITED STATES DISTRICT COURT

• • (Title Omitted in Printing—73-C-2522) • •

ANSWER

Now comes defendants John D. Carey, Carey Preston, Gerald Sbarboro, Alvin Boutte, Maria Cerda, Bernard Friedman, Louise Malis, Thomas Nayder, Margaret Wild, James F. Redmond and Rudolph Jezik, Jr., by their Attorney, Michael J. Murray, and for their Answer to the Second Amended Complaint state as follows:

Count I

1. Defendants admit the alleged claim is a civil action for declaratory and injunctive relief, but deny that the plaintiffs have been deprived of any right to procedural due process, or any right whatsoever.

2. Defendants deny the allegations of paragraph 2.

3. Defendants neither admit nor deny the allegations of paragraph 3 but demand strict proof thereof insofar as they are relevant to the proceedings.

4. Defendants admit that Silas Brisco is a thirteen year old male residing in the City of Chicago and enrolled at the Barton School. Defendants also admit that Catherine Brisco is the mother of Silas and is serving as next best friend. Defendants further state they have insufficient knowledge upon which to form a belief as to the truth of the further allegations of paragraph 4 and, therefore, deny the same.

5. Defendants deny the allegations of paragraph 5. Further answering, defendants state that plaintiffs' motion for a class action determination was denied on June 13, 1974.

6. Defendants admit that John D. Carey, Carey Preston, Gerald Sbarboro, Maria Cerda, Bernard Friedman, Louise Malis, Thomas Nayder, and Margaret Wild are members of the

Board of Education of the City of Chicago. Defendants deny the remaining allegations of paragraph 6. Further answering, defendants allege that pursuant to Ch. 122, sec. 34-19, Ill. Rev. Stats., the Board of Education of the City of Chicago "shall establish by-laws, rules and regulations, which shall have the force of ordinances, for the proper maintenance of a uniform system of discipline for both employees and pupils . . . It may expel, suspend or otherwise discipline any pupil found guilty of gross disobedience, misconduct or other violation of the by-laws, rules and regulations."

7. Defendants admit the allegations of paragraph 7, but defendants deny that the General Superintendent is personally and directly responsible for "overseeing of the disciplinary process." Further answering, defendants state that Ch. 122, sec. 34-8, Ill. Rev. Stats., provides: "The general superintendent of schools shall prescribe and control, subject to the approval of the board . . . discipline in and conduct of the schools."

8. At all times alleged in the Second Amended Complaint, the former Rudolph Jezik, Jr. now deceased was the principal of the Barton School. Mr. Jezik while in the course of performing his duties as principal was shot and killed at the Barton School on January 17, 1974. Defendants deny the further allegations of paragraph 8. Further answering, defendants state that Ch. 122, sec. 34-19, Ill. Rev. Stats., authorizes the Board of Education of the City of Chicago to "establish by-laws, rules and regulations, which shall have the force of ordinances, for the proper maintenance of a uniform system of discipline for both employees and pupils . . . It may expel, suspend or otherwise discipline any pupil found guilty of gross disobedience, misconduct or other violation of the by-laws, rules, and regulations." Pursuant to this authorization the Board of Education has enacted by-laws 6-8 and 6-9 as follows:

> "Sec. 6-8. Exclusions of Pupils—Cause. Whenever a pupil in any school is found by the school authorities to be a distinct detrimental influence to the conduct of the

school, or to be unable to profit or benefit from further experience in his school, he may be transferred to special educational facilities in the school system, or may be excused from further attendance, or excluded from school by the General Superintendent of Schools."

"Sec. 6-9. Suspension of Pupils—Cause. For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Every such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil."

9. Defendants admit that Silas Brisco was enrolled in the Barton School and that on many occasions he was asked to remove the earring. Defendants deny the remaining allegations of paragraph 9.

10. Defendants admit the allegations of paragraph 10. Further answering, defendants state that it was explained to plaintiff Silas Brisco that the earring was a symbol of gang membership and as such it created a hazard to him and to other children.

11. Defendants admit the allegations of paragraph 11, except they deny that plaintiff Silas Brisco stated that the earring was a symbol of black unity.

12-13. Defendants admit the allegations of paragraphs 12 and 13.

14. Defendants admit the allegations of paragraph 14. Further answering, defendants state that during the conference held on September 11, 1973, Mrs. Brisco further stated that the earring worn by Silas was a symbol of mutual association of some of the boys in school. Defendants further allege that plaintiff Silas Brisco stated that Anthony Traylor was allowed to wear his earring at all times. Mr. Traylor was called to the office and in response to Mr. Brisco's query about why he wasn't

wearing his earring, Mr. Traylor replied that his guardian wouldn't permit it because she didn't want him to have any trouble at school.

15. Defendants admit the allegations of paragraph 15. Further answering defendants state that plaintiff Silas Brisco's suspension was ordered pursuant to Ch. 122, sec. 34-19, Board Rule 6-9 and Ch. 122, sec. 34-84a as follows:

"Teachers and other certified educational employees shall maintain discipline in the schools. In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians."

Defendants further allege that plaintiff Brisco's suspension was terminated October 4, 1973.

16. Defendants deny the allegations of paragraph 16. Further answering, defendants state that Silas Brisco and other male students of Barton School were cautioned the day prior to this incident. Further, that Mrs. Brisco had, in the spring of 1973, discussed this problem at great length with defendant Jezik and Mr. Stephen Brown, District 16 Superintendent and as a result of the spring conference, Mrs. Brisco had Silas remove the earring. The Rules of the Board of Education of the City of Chicago afford adequate safeguards for the protection of any and all rights of the plaintiffs. The facts show the pursuant to Ch. 122, sec. 34-19, Ill. Rev. Stats. and Board Rule 6-9, plaintiffs were afforded ample opportunity of notice and hearing and were fully advised of the reasons for the Board's action in accord with the requirements of the Constitution of the United States, the statutes of the State of Illinois and the Rules of the Board of Education of the City of Chicago.

17. Defendants admit that Silas Brisco was suspended in the spring of 1973, but deny that the suspension was a result of

wearing an earring. Further answering, defendants allege that the suspension in the spring of 1973 was a result of a fight at the Barton School in which plaintiff Silas Brisco was a participant. Defendants have insufficient knowledge upon which to form a belief as to the truth of the other allegations of paragraph 17 and, therefore, deny the same.

18-19. Defendants admit the allegations of paragraphs 18 and 19.

20-23. Defendants state that the allegations of paragraphs 20 through 23 are argumentative and conclusory and require no answer, but insofar as the Court may find them factual, defendants deny each and every allegation contained therein.

WHEREFORE, defendants pray that the Court deny the relief prayed for and that defendants may have judgment entered herein for their costs.

Count II

1-5. Defendants repeat and incorporate their answers to paragraphs 1 through 5 of Count I as their answers to paragraphs 1 through 5 of Count II as though fully set forth herein.

6-17. Defendants repeat and incorporate their answers to paragraph 6 through 17 of Count I as their answers to paragraphs 6 through 17 of Count II as though fully set forth herein.

18. Defendants admit the allegations of paragraph 18.

19. Defendants admit the allegations of paragraph 19. Further answering, they state that in the exercise of their legislative discretion of Illinois General Assembly has enacted sec. 34-19 the Illinois School Code which empowers the Board of Education of the City of Chicago to provide by rule for the discipline in the schools. Pursuant to this statutory authority, the Board of Education of the City of Chicago adopted Rule 6-9 as follows:

> "Sec. 6-9. Suspension of Pupils—Cause. For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Every such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil."

20. Defendants admit that plaintiff Brisco is under the jurisdiction of the defendants. Further answering, defendants state that the General Assembly of the State of Illinois has specifically authorized the Board of Education of the City of Chicago to set forth guidelines for the maintenance of discipline. Further, that the Supreme Court of Illinois has taken judicial notice that "The problems inherent in the supervision and management of a school system in a metropolitan area of 500,000 or more, and particularly, in the City of Chicago, are far more complex and may well require different modes of operation than a system in an average-sized district." *Latham* v. *Board of Education*. 31 Ill. 2d 178.

21-23. Defendants state that the allegations of paragraphs 21 through 23 are argumentative and conclusory and require no answer, but insofar as the Court may find them factual, defendants deny each and every allegation contained therein.

WHEREFORE, defendants pray that the Court deny the relief prayed for and that defendants may have judgment entered herein for their costs.

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IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

PUSH, et al.,
Plaintiffs,

vs.

JOHN D. CAREY, et al.,
Defendants.

Nos. 73 C 2522 and 74-C-303 Consolidated.

JARIUS PIPHUS, et al.,
Plaintiffs,

vs.

JOHN D. CAREY, et al.,
Defendants.

Before the Honorable George N. Leighton, United States District Judge

ORDER

Plaintiffs have moved for an amendment of the final order entered in these cases. The record discloses that after a hearing of these consolidated civil rights actions, they were submitted to the court for final adjudication on a stipulation that included certain depositions, documents, agreed facts and affidavits. In a Memorandum Opinion and Order, the late Judge Richard W. McLaren ruled that defendants had unconstitutionally suspended plaintiffs from school; therefore, their records should be corrected and their reinstatement to class ordered. Judge McLaren, however, concluded that although plaintiffs would technically be entitled to recover damages in a case like this one, no proof of damages was offered; and that the record was completely

devoid of any evidence which could form the basis even of a speculative inference measuring the extent of their injuries. This court's review of Judge McLaren's Memorandum Opinion and Order leads it to conclude that no amendment should be allowed. Accordingly, plaintiffs' joint motion to amend is denied.

So ordered:

/s/ GEORGE N. LEIGHTON
George N. Leighton
United States District Judge

Dated: April 30, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR, AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR, AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

CITATIONS.

Cases.

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PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR, AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents pray that the requested Writ of Certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 22, 1976.

OPINIONS BELOW.

The opinion of the Court of Appeals reversing the decision of the District Court is officially reported at 545 F. 2d 30 and is reproduced in Appendix A to the Petition at page A1. The memorandum opinion of the District Court was not reported. It is reproduced in Appendix A to the Petition at page A5.

JURISDICTION.

The Petition for Writ of Certiorari adequately sets forth the jurisdictional requisites.

QUESTION PRESENTED.

Whether the holding of the Court of Appeals conflicts with the holdings of other circuit courts of appeals as to the appropriate measure of damages in cases of bad faith violations of constitutional rights and thereby raises a question of substantial importance to be resolved by the United States Supreme Court?

REASONS FOR REFUSING THE WRIT.

The Petition should be denied because the Seventh Circuit's holding as to the appropriate measure of damages for constitutional rights violations does not conflict with the holdings of the other circuits. The alleged "widespread disagreement" (Petitioners' Brief for Certiorari at 13) among the Circuits on this issue is a result of Petitioners' misstating the holdings of the cases they cite.

The cases Petitioners cite for the proposition that only nominal or no damages may be recovered for violations of constitutional rights absent proof of actual consequential losses either state the contrary to that or do not address the issue at all. Thus, in *Magnett* v. *Pelletier*, 488 F. 2d 33 (1st Cir. 1973), Petitioners' Brief for Certiorari at 9, the First Circuit did reverse the district court's award of $500 nominal damages

because such damages are a mere token, but in so doing also recognized that more than nominal damages can be awarded for the loss of civil rights in themselves:

> "This is not to say that in a civil rights action a plaintiff who proves *only an intangible loss of civil rights* or purely mental suffering may not be awarded *substantial compensatory damages*." 488 F. 2d at 35. (Emphasis added.)

In *Manfredonia* v. *Barey*, 401 F. Supp. 762 (E. D. N. Y. 1975), Petitioners' Brief for Certiorari at 12, the court, as Petitioners point out, affirmed its own discretion to determine the amount of damages to be awarded. However, Petitioners fail to mention that it also recognized that no evidence other than the violation of constitutional rights is needed to justify substantial compensatory damages:

> "Neither plaintiff in this action has claimed any resulting out-of-pocket loss, diminution of earnings or physical injury of such consequences as to warrant the greatly increased compensation they demand. Such familiar elements of damage, however, need not be shown in order to justify a reasonably substantial compensatory award in a civil rights case. [cite omitted] It is sufficient to establish, as plaintiffs have succeeded in doing here, a deprivation of constitutional rights through misuse of official power." 401 F. Supp. at 770.

The cases Petitioners cite which deny compensatory damages for civil rights violations also do not contradict the Seventh Circuit's holding because they concern only the insufficiency of the evidence offered to establish the actual consequential damages that were claimed and do not reach the issue of whether plaintiffs could also rightfully claim general damages for the constitutional violation alone. Thus, in *Fort* v. *White*, 530 F. 2d 1113, 1116 (2nd Cir. 1976), Petitioners' Brief for Certiorari at 10, plaintiffs did not claim general compensatory damages in their complaint, and explicitly waived such damages at trial. Similarly, in *Stolberg* v. *Members of Bd. of Tr. for State Col. of Conn.*, 474 F. 2d 485, 488-9 (2nd Cir. 1973), Petitioners' Brief for

Certiorari at 11, the court denied an award of actual compensatory damages for injury to reputation and for humiliation to an unconstitutionally dismissed college professor, who was subsequently elected to the state legislature, because there was no evidence to establish that he suffered the claimed injuries. Petitioners' reliance on the "strong language" in *Cordeco Dev. Corp.* v. *Vasquez*, 539 F. 2d 256, 261-2 (1st Cir. 1976), Petitioners' Brief for Certiorari at 9-10, illustrates their confusion in trying to equate, on the one hand, findings of insufficient proof to establish claimed consequential injuries from constitutional rights violations with, on the other hand, holdings that constitutional violations cannot in themselves constitute compensable injuries. In *Cordeco* the court refused to award damages for lost profits from the unconstitutional denial of a mining license because plaintiffs did not present proof to establish that they actually suffered lost profits as a result of the constitutional violation. Similarly, in *Smith* v. *Losee*, 485 F. 2d 334, 344-5 (10th Cir. 1973), Petitioners' Brief for Certiorari at 8-9, the issue addressed by the court was not whether damages could be awarded because of the nature of the constitutional violation itself, but rather, whether the record contained adequate facts to support an award of damages for specific claimed injuries attendant upon the constitutional violation, *i.e.* plaintiff's inability to find a teaching position and his harassment by the defendants.

The nominal damage cases Petitioners cite are also irrelevant to the holding of the Seventh Circuit below. These cases properly recognize that even if the plaintiff does not establish a specific monetary value to compensate him for the loss of his constitutional rights he has an automatic right to *at least* nominal damages. None of the cases cited by Petitioners state, or imply, that upon an adequate showing of the nature and value of the constitutional right of which he was deprived, plaintiff cannot recover more than nominal damages. Thus, in *Basista* v. *Weir*, 340 F. 2d 74 (3rd Cir. 1965), Petitioners' Brief for Certiorari

at 11, the Third Circuit presumed nominal damages from the deprivation of plaintiff's constitutional rights in order to sustain the jury's award of $1,500 punitive damages. 340 F. 2d at 87. The court did not state that proof of the deprivation of a constitutional right entitles plaintiff to no more than nominal damages. That such was not its intent is clear from its explicit reliance on Justice Holmes' opinion in *Nixon* v. *Herndon*, 273 U. S. 536 (1927). The Court held in that case that a private damage action for $5,000 could be maintained for deprivation of the right to vote even though, as the court in *Basista* noted, "it does not appear that the wrong effected any damage in dollars or cents for the plaintiff." *Basista*, 340 F. 2d at 88. The cases authorizing general damages for voting rights violations provided the *Basista* court with a "useful and persuasive analogy" to the action before it for deprivation of personal liberty. 340 F. 2d at 88. See *Wiley* v. *Sinkler*, 179 U. S. 58, 65 (1900); see also *Wayne* v. *Venable*, 260 F. 64, 66 (8th Cir. 1919) ("In the eyes of the law this right [constitutional right to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing. . . .").

Petitioners similarly misstate the Third Circuit's holding in *Paton* v. *LaPrade*, 524 F. 2d 862 (1975), Petitioners' Brief for Certiorari at 11, which did not, as Petitioners contend, require proof of individualized injury to support an award of more than nominal damages. Rather, it reversed the district court's grant of defendants' summary judgment motion denying any damages because of the possibility that after trial plaintiffs could recover nominal, compensatory or punative damages without proving out-of pocket expenses. 524 F. 2d at 871-872. Petitioners' citation on the nominal damages question of *Tyrrell* v. *Speaker*, 535 F. 2d 823, 829-30 (3rd Cir. 1976), Petitioners' Brief for Certiorari at 11, *Schiff* v. *Williams*, 519 F. 2d 257, 261 (5th Cir. 1975), Petitioners' Brief for Certioriari at 11, *Sexton* v. *Gibbs*, 446 F. 2d 904 (5th Cir. 1971), *cert. denied* 404 U. S. 1062 (1972), Petitioners' Brief for Certiorari at 11, *Bell* v. *Gayle*,

384 F. Supp. 1022, 1026 (N. D. Tex. 1974), Petitioners' Brief for Certiorari at 12, and *Washington* v. *Official Court Stenographer*, 251 F. Supp. 945, 947 (E. D. Pa. 1966), Petitioners' Brief for Certiorari at 12, are similarly misleading since none of these cases specify that only nominal damages, and not general compensatory damages, may be awarded for constitutional violations which are not supported by proof of actual individualized injury.

Petitioners also cite many cases which have no relevance to the issues decided by the Court of Appeals below since they deny damages because of the defendant officials' defense of good faith: *Ault* v. *Holmes*, 369 F. Supp. 288, 293 (W. D. Ky. 1973), Petitioners' Brief for Certiorari at 12 (damages denied in prison transfer case because "the question of the unconstitutionality of such transfers was very much in doubt."); *Jones* v. *Superintendent*, 370 F. Supp. 488, 493 (W. D. Va. 1974), Petitioners' Brief for Certiorari at 13 (vegetarian prisoner not provided with adequate meatless diet while in solitary confinement could not get damages where defendant acted in good faith upon physician's advice); *Callahan* v. *Sanders*, 339 F. Supp. 814, 819 (M. D. Ala. 1971), Petitioners' Brief for Certiorari at 12 (justices of the peace who heard traffic cases not properly before them were not liable for damages as they were reasonably confused as to their exact jurisdiction); *Cordova* v. *Chonko*, 315 F. Supp. 953, 964 (N. D. Ohio 1970), Petitioners' Brief for Certiorari at 12 (nominal damages where defendant high school principal made a reasonable mistake in believing he could suspend long-haired student without a prior hearing). As the District Court in the instant case found that Petitioners had acted in bad faith, Petitioners' Brief for Certiorari at A14, these cases are inapposite.

Finally, three cases cited by Petitioners because they deny damages for civil rights violations were decided on the basis of affirmative matter wholly unrelated to a lack of proof of general damages: *Knuckles* v. *Prasse*, 435 F. 2d 1255, 1257 (3rd

Cir. 1970), Petitioners' Brief for Certiorari at 11 (denial of damages upheld because district court acted within its discretion in joining legal and equitable counts and treating both as equitable); *Tracy* v. *Robbins*, 40 F. R. D. 108, 113 (D. S. C. 1966), Petitioners' Brief for Certiorari at 10 (class suit for damages dismissed because damages were several and distinct for each class member); *International Prisoners' Union* v. *Rizzo*, 356 F. Supp. 806, 810 (E. D. Pa. 1973), Petitioners' Brief for Certiorari at 12 (suit for damages dismissed because plaintiffs, as members of a class for which prior successful action for injunctive and declaratory relief had been brought, were bound by prior case and could not bring a new action).

Thus, only by misreading the holdings of cases do Petitioners create a semblance of conflict among the circuit and district courts. Furthermore, any complaints Petitioners have about the unfair or disproportionate nature of the award of damages in this case should await the District Court's determination on remand of what those damages actually are.

Finally, Petitioners do not challenge on legal or policy grounds the correctness of the Seventh Circuit's holding. It should be noted in this regard that a holding contrary to that of the Seventh Circuit would give school authorities the freedom to ignore the requirements of procedural due process whenever they believed they could justify their suspensions or expulsions in a subsequent hearing which a court may order. The Seventh Circuit held below, Petitioners' Brief for Certiorari at A4, that if the suspension of plaintiffs would have been imposed had there been no due process violation, plaintiffs cannot recover consequential damages. Although it has been unsuccessfully argued to this Court that the Seventh Circuit's position on this question of consequential damages from civil rights violations unduly weakens the protection from official invasion which 42 U. S. C. Sec. 1983 was intended to give constitutional rights (see Petitioners' Brief for Certiorari, *Hostrop* v. *Board of Junior College District No. 515*, 425 U. S. 963 (1976), *denying cert. to* 523

F. 2d 569 (7th Cir. 1975)), there can be no dispute that if Petitioners' argument against awarding general damages solely for bad faith deprivations of constitutional rights is also recognized by this Court, then school officials would enjoy total immunity for their violations of procedural due process whenever they can come up with *ex post facto* justifications for their disciplinary measures, regardless of how unjustified their original denials of due process had been.

CONCLUSION.

For the foregoing reasons the Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied or, if granted, the Opinion of the Court of Appeals on the issues presented herein should be summarily affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

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OPINIONS BELOW.

The opinion of the Court of Appeals reversing the decision of the District Court is reported at 545 F. 2d 30. It is reproduced in Appendix A to the Petition for Certiorari at p. A1.

The memorandum opinion of the District Court was not reported. It is reproduced in Appendix A to the Petition for Certiorari at p. A5.

JURISDICTION.

The decision of the Court of Appeals was entered on November 22, 1976. The petition for a Writ of Certiorari was filed on February 19, 1977. Certiorari was granted April 18, 1977. Jurisdiction is conferred on this court under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the decision of the Court of Appeals, holding that plaintiffs who prevail on a claim of violation of civil rights are entitled as a matter of law to general compensatory damages absent a showing of injury or pecuniary loss, substantially conflicts with the holdings of other Circuit Courts of Appeals which permit a denial of such damages or allow an award of only nominal damages?
2. Whether the Court of Appeals erred in substituting its own judgment for that of the District Court, sitting as the trier of fact, when it determined that the plaintiffs were not entitled to compensatory damages because they, respectively, failed to establish any injury and failed to quantify their damages?

STATEMENT OF THE CASE.

These are consolidated cases wherein the minor plaintiffs, Silas Brisco and Jarius Piphus, seek relief upon a claim that their respective suspensions from school violated their constitutional due process rights.

A. Silas Brisco.

Silas Brisco attended the fifth grade at the Barton Elementary School in 1972-1973 school year. During this period of time, the school was in a transition from a predominantly white to predominantly black enrollment. Barton School officials were aware of physical violence connected with gang rivalries and recruitments ir the school and that, in addition, a single earring was a symbol of certain gang membership. During the 1972-1973 school year at Barton, black male students began to attend the school wearing these earrings. School officials determined that in the interest of student safety, male students would be prohibited from wearing these earrings.

Following the establishment of the earring prohibition rule, various male students were orally informed of the rule and were warned that continued wearing of the earring could result in suspension. Silas Brisco had actual notice of the earring ban. In May of 1973, school officials noticed the appearance of certain earrings denoting gang membership in a branch of the Disciples street gang, the "Boss Pimps Disciples." The particular earring which Brisco wore was recognized by school officials as denoting officership in that gang.

In May of 1973, Silas Brisco was told to remove the earring or face suspension. He refused to do so and was suspended for a portion of the school day. Thereafter, his mother met with the District Superintendent and Brisco agreed to remove the earring and was readmitted.

After school reconvened for the Fall semester, 1973, Brisco again wore the earring to school on September 11, 1973 and during the course of the school day was brought to the principal's office where the principal and assistant principal directed him to remove the earring. Brisco refused. The principal then conferred with the District Superintendent and informed Brisco that he must comply with the rule or face suspension.

When Brisco refused to remove the earring, the assistant principal left the office area, telephoned Brisco's mother and wrote up a suspension report form. When Mrs. Brisco came to the school and conferred with the school officials, she was informed that her son would be suspended if he continued to refuse to comply with the earring rule. Mrs. Brisco supported her son, and the twenty-day suspension was then imposed. After having served 17 days of the suspension, Brisco was voluntarily readmitted during the pendency of a Motion for Preliminary Injunction in this action.

B. Jarius Piphus.

Jarius Piphus was a student at Chicago Vocational High School (CVS) during the 1973-1974 school year. The written rules of CVS prohibited cigarette smoking and bringing intoxicating substances on to school property. Jarius Piphus had actual notice of these rules.

On January 23, 1974, the school principal observed Piphus and another student passing an irregularly shaped cigarette between them. As the principal neared the boys, he smelled smoke which he believed to be the odor of marijuana. The principal also observed Piphus attempting to pass cigarette papers to the other students. When the boys saw Mr. Brown, they discarded the cigarette and no attempt was made to recover the cigarette. Piphus admitted smoking the cigarette but denied that the substance he was smoking was marijuana.

The principal accompanied the two students to the school's disciplinary office and there instructed the assistant principal to impose the "usual procedure" of a twenty-day suspension. Although the principal admits that it was his decision to suspend Piphus, the formal suspension was effected by the assistant principal. At the time of the suspension, the assistant principal informed Piphus that he was being given a twenty-day suspension for smoking cigarettes. Piphus later learned that the reason also including class cutting.

Subsequently, two meetings were held among the school officials, Mr. Piphus, members of his family, and legal aid representatives. The meetings were not hearings but rather were for the purpose of explaining the previous actions taken. At the second meeting, the legal aid representatives were excluded when they attempted to tape record the session. Upon administrative review by the District Superintendent, Piphus' suspension was reduced to five days. Concurrently, Judge Bauer entered a temporary restraining order requiring the readmission of Piphus. He missed eight days of classes.

C. Findings.

The District Court found that the suspensions in question raised two legal issues: whether the students were given sufficient prior notice of conduct which was prohibited, and whether adequate hearings were held at the time each boy was suspended.

The Court went on to find that both Brisco and Piphus had actual notice of reasonably narrow regulations of prohibited conduct. Because both suspensions potentially exceeded ten days, both boys were found entitled to receive a formal evidentiary hearing, which should include:

1. Pre-hearing notice, including a short summary of the evidence upon which the administrator intends to rely.
2. To be represented at the hearing either by counsel or other responsible advocate.

3. To present witnesses on his own behalf and cross-examine witnesses.
4. At his own expense, to make a tape recording or transcript of the hearing.
5. An impartial hearing officer to preside.

Accordingly, both Brisco and Piphus failed to receive adequate disciplinary hearings; the decisions to suspend both of them were made by their major factual accusers; neither had an opportunity to present meaningful evidence; conferences were held following the decision to suspend them; and in the case of Jarius Piphus, his attorneys were excluded from a post-suspension conference and not allowed to make a tape recording of the conference.

Each plaintiff is entitled to a declaration that his suspension in question was unconstitutional.

Each plaintiffs' school records should be corrected to expunge any reference to these suspensions.

None of the defendants acted maliciously in enforcing the disciplinary school policies against the plaintiffs, and the defendants undoubtedly believed they were protecting the integrity of the educational process.

The defendants were nonetheless not immune from monetary liability because under the *"Linwood* Rationale"[1] defendants should have known that the plaintiffs were entitled to some type of an adjudicative hearing.

An award of damages must be based upon some proof to a reasonable degree of certainty. Plaintiffs put no evidence into the record to quantify their damages. In addition, plaintiffs put no evidence into the record which could form a basis of even a speculative inference measuring the extent of their respective injuries. Damages, accordingly, denied due to a complete lack of proof thereof. (Pet. for Writ A5)

• • • • •

1. *Linwood* v. *City of Peoria,* 463 F. 2d 763 (7th Cir. 1972).

On plaintiffs' post-trial motions, Judge McLaren reopened the issue of damages and the plaintiffs submitted arguments and exhibits in support of an award. Following the death of Judge McLaren, the case was assigned to Judge George N. Leighton; and on April 6, 1976, he denied the plaintiffs' motions, citing the same reasons cited by Judge McLaren. (App. p. 28)

Plaintiffs appealed the trial court's failure to award general compensatory damages and the trial court's failure to clearly grant the requested declaratory and injunctive relief.

The Seventh Circuit Court of Appeals held for plaintiffs-appellants on all issues. The Court held that plaintiffs whose civil rights have been violated are entitled to recover general compensatory damages "inherent in the nature of the wrong," even though the plaintiff has failed to establish individual injury or pecuniary loss. (Pet for Writ A1)

SUMMARY OF ARGUMENT.

Certiorari in this instance was granted upon the issue that the holding of the Seventh Circuit Court of Appeals was substantially in conflict with the holdings of the other circuits wth regard to the proper application of damages in a civil rights case. This may be somewhat of an understatement for there appears to be no consistency whatsoever throughout the circuits as to any proper rule to apply in an action for violation of civil rights. (see cases cited in Petition for Writ and Response)

The circumstances which have evolved in the present consolidated cases is a situation involving a retroactive finding of a violation based upon a requirement of foreseeability. School officials determined that the individual plaintiffs, both Chicago public school students, violated school rules, one boy for smoking on school premises, and the other boy for wearing a street gang symbol to school. The District Court found that both boys were on actual notice of narrow regulations prohibiting this conduct; further, both boys acknowledged participating in the prohibited activity. However, the court nonetheless found that these suspensions were without adequate due process hearings, and that the defendants could be liable for damages because, although they acted without malice and were undoubtedly endeavoring to protect the integrity of the school system, they should have realized that by failing to provide an adequate due process hearing prior to the suspension, they would be violating the constitutional rights of the students. It was clearly apparent from the evidence that neither boy had suffered any pecuniary loss or any individualized injury, and therefore both special and general compensatory damages were denied. The plaintiffs appealed on the failure to award general compensatory damages. The Seventh Circuit Court of Appeals reversed the trial court, charging as error the trial court's failure to award

general compensatory damages which were inherent in the nature of the wrong and must be awarded even absent a showing of pecuniary loss or individualized injury, which otherwise is the standard for a compensatory award.

Petitioner's believe that, commendable though the motive may be, the Seventh Circuit Court of Appeals has extended itself beyond reasonable concepts of the law of damages in attempting to award an aggrieved plaintiff some money for whatever "troubles" he may have encountered.

The invasion of a person's civil rights is a civil wrong, and as such it is a tort. Courts have traditionally observed that the ordinary rules of tort law shall apply to the litigation of constitutional violations, and in fact the violation of civil rights is regularly referred to as a "constitutional tort." Under the circumstances, the traditional law of damages applicable to a tort must apply to a violation of a constitutional tort. The law of damages has always been compensation-oriented. To the extent that the plaintiff may have suffered pecuniary loss or individualized injury, he is entitled to compensation and petitioners herein would not dispute this. The plaintiff who has been wronged, whether by trespass or constitutional tort, but who has suffered no loss or injury is entitled to no more than a recognition of the invasion of his rights by an award of nominal damages. If there is an intent to punish the defendants by affecting some form of penal retribution, then the law of punitive damages is available. Furthermore, Congress has recently enacted an amendment to 42 U. S. C. 1988 to allow an award of attorneys' fees to a prevailing party in an action brought for civil rights violations pursuant to, *inter alia,* 42 U. S. C. 1983, and this more than sufficiently should provide a deterrent which some authorities believe is necessary to the proper enforcement of civil rights statutes.

ARGUMENT.

I.

CONSTITUTIONAL VIOLATIONS ARE CIVIL WRONGS SOUNDING IN TORT.

At tort is a civil wrong, a transgress by the defendant into the rights of the plaintiff, arising out of protected common law or statutory rights.[1] When a defendant carelessly and negligently, perhaps even maliciously, proximately causes an injury to the plaintiff, that defendant may be liable for the actual damages caused by that injury—none, or nominal, if sufficiency of proofs of damages are wanting; compensatory for the special and general loss; finally, for the wantoness or maliciousness of the act, punitive damages to set the defendant up as an example and to deter him and others from committing further similar acts. This is as apt for trespass or a battery, long recognized as torts at common law. Thus the law of torts concerns itself with the allocation and adjustment of losses arising out of human activities and affords compensation for injuries sustained by one person as a result of the conduct of another.[2]

Civil rights actions find their origin in the Civil Rights Act of 1871 which is now codified at 42 U. S. C. 1983. It would appear that the original purpose behind the passage of this civil rights act was to enforce the 14th amendment, by providing some form of civil remedy to redress acts of racial discrimination[3]. At its conception the act was presumed to be designed to enjoin a violation rather than provide compensation and as such was not widely used as a vehicle to collect money damages. Ultimately, by this Court's decision in *Monroe* v. *Pape, supra.*, the scope

1. Prosser, William L., *Handbook of the Law of Torts*, 3rd ed., West Publishing Co., 1964, at p. 2.

2. Prosser, *supra.*, note 1, p. 6.

3. *Monroe* v. *Pape*, 365 U. S. 167, 173-183 (1961).

of this Civil Rights Act was recognized to include varying causes of action for damages for violation of civil rights, other than dealing with racial discrimination.

Recognizing that the protection afforded a litigant was a civil wrong, but founded upon constitutional rights, this Court in *Monroe* v. *Pape, supra.*, at 187, determined that such actions sounded in tort and particularly observed:

> § 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Legal writers have labelled these actions for damages under the applicable statutes as "constitutional torts", and they are consistently referred to as such.[4]

Unfortunately, but primarily because the issue was never brought before it, this Court never attempted to determine the form of damages which should be awarded to a prevailing plaintiff. Under the circumstances, a wide variety of law has developed throughout the circuits. In many instances, courts, and particularly the Seventh Circuit Court of Appeals in the present case, have ignored traditional rules of damages in order to establish something more than a nominal award when the plaintiff's rights have been violated, however technical the determination may have been. The justification for these compensatory awards is that once the defendant invaded the rights of the plaintiff, there is some sort of irrebuttable presumption of compensatory damages. This can be nothing more than a fiction, for there is no area of the tort law of damages which permits an award of compensation absent pecuniary loss or individualized injury.

If, as this Court and the lower courts have consistently held, a violation of civil rights is a civil wrong which sounds in tort, then the rule of tort damages must necessarily apply. To hold otherwise is not compensation, it is retribution, an area totally alien to Anglo-American civil law.

4. Shapo, Marshall S., *Constitutional Tort: Monroe* v. *Pape and the Frontier Beyond*, 60 Nw. U. Law. Rev. 277 (1965).

II.

THE TORT LAW OF DAMAGES APPLY TO ALL CIVIL WRONGS.

Substantive damages have always been based upon the necessity of compensating the injured party for his actual loss. As Blackstone observed in his *Commentaries*[5]:

> Now, since all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject matter in dispute to the legal owner; . . . or, where that is not a possibility, by making the sufferer a pecuniary satisfaction;. . . .

Thus, when it would not be possible to deliver or restore the subject matter of the wrong, the injured party should receive some monetary award for the actual damage which he suffered through the wrong done him. In terms of American law, and perhaps somewhat more succinctly, Sedgwick, in his volumes on damages,[6] states:

> The relief afforded by a tribunal may be either preventative or remedial. If remedial, it may again be either specific or it may consist in the mere award of pecuniary remuneration. The common law, as it exists in England and as it was introduced into the United States, is generally remedial in character, and, its remedies are of a pecuniary description.

These authorities cited stand for the principle of compensation, but the specific elements remain to be considered.

5. *Blackstone's Commentaries,* Sir George Tucker (1803) vol. IV, ch. 8, p. 116 (Rothman Reprints, So. Hackensack, New Jersey, and Augstus M. Kelley, publishers, New York, New York, [1969]).

6. Sedgwick, Arthur G. and Beale, Joseph H., *A Treatise on the Measure of Damages,* 9th ed. (Baker, Voorhis & Co. [1912]) (hereafter, cited as Sedgwick), vol. I, p. 2.

Anglo-Saxon monarchs rigidly controlled and standardized early administration of damages, according to Sedgwick, and as early as the 6th century, A.D., the monarch carefully defined such compensations as, "If an ear be cut off let compensation be made by payment of twelve shillings." With the ascendency of the Normal rule, such minutiae lessened, the measure of damages being more entrusted, suggests Sedgwick, to a slowly improving jurisprudence and a recognition that arbitrary rules used to fix values "are always a misfortune."[7]

Ultimately then, Anglo-American law of damages centered upon the principle that for the invasion of a right, the remedy was compensation. As Sedgwick explained:[8]

> In all cases, then, of civil injury and breach of contract the declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed . . . So, in actions of tort, the damages awarded should be an amount sufficient to indemnify the plaintiff for the loss which he has suffered at the hands of the defendant. In short, the purpose of awarding damages is the same whatever the form of action. . . .

The nature of such award of damages is fundamentally controlled by the refusal to redress an injury without legal wrong and its correlative proposition. "[T]he infringement of a legal right, when unattended by any positive injury, furnishes no ground for other than nominal relief."[9]

In Sedgwick's analysis the elements of compensation are:

> *First.* Of the actual pecuniary loss directly sustained; . . .
>
> *Second.* Of the indirect pecuniary loss sustained in consequence of the primary loss; . . .
>
> *Third.* Of the physical and mental suffering produced by the act or omission in question; pain; vexation; anxiety.

7. Sedgwick, vol. I, pp. 7-10.

8. Sedgwick, vol. I, pp. 25-26.

9. Sedgwick, vol. I, p. 29.

> *Fourth.* The value of the time consumed in establishing the contested right by process of law, if suit become necessary.
>
> *Fifth.* The actual expenses incurred to obtain same end—costs and counsel's fees.
>
> *Sixth.* The sense of wrong or insult, in the sufferer's breast, resulting from an act dictated by a spirit of wilful injustice or by a deliberate intention to vex, degrade or insult. . . .[10]

These injuries may be readily categorized. The Fourth and Fifth elements, above, are generally not allowable except under unusual circumstances, or by statute (see *Alyeska Pipeline* v. *Wilderness Soc.*, 421 U. S. 240 [1975]). The First is clearly the actual pecuniary loss sustained by the wrong. The Second, Third and Sixth items are the intangible injury which flows, although not necessarily inevitably, from the wrong done. These then are characterized in law, respectively, as special compensatory damages and general compensatory damages.[11]

The goal of courts has always been to recompense the plaintiff for the tortious injury suffered:

> The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot, except in the cases in which punitive damages may be recovered, hold a defendant liable in damages for more than the actual loss which he has inflicted by his wrong. In other words, one injured by the breach of a contract or the commission of a tort is entitled to a just and adequate compensation for such injury, but no more. His recovery is, in the absence of circumstances giving rise to an allowance of punitive damages, limited to a fair compensation and indemnity for the injury which he suffered. The law will not put him in a better position than he would be had the wrong not been done or the contract not been broken.[12]

It has long been recognized in the law of damages that where no actual damages have been suffered, but there has been an

10. Sedgwick, vol. I, pp. 42-43.
11. 22 Am. Jur. 2d, Damages § 15.
12. 22 Am. Jur. 2d, Damages § 13.

invasion of a paramount right, the trier of the fact *may* make a nominal award. "It is now well established that nominal damages may be recovered for the bare infringement of a right, or for a breach of contract, unaccompanied by any actual damage."[13] In Sedgwick's opinion, the rule of giving nominal damages exists to "settle the question of title or determine rights of the greatest importance."[14]

Finally, there is the concept of exemplary damages (also called punitive or vindictive). As explained by Sedgwick:

> In actions of tort, when gross fraud, wantonness, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him up as an example to the community.[15]

Legal writers have challenged these traditional concepts of damages as being unworkable in administering justice to a plaintiff who has suffered a constitutional tort. In recognition that the plaintiff may well have suffered no actual loss, but yet somehow seems equitably entitled to some monetary award, principles of compensation have been ignored as passe in constitutional tort cases. See, for example, Note, Civil Actions for Damages under the Federal Civil Rights Statutes, 44 Texas L. Rev. 1015, 1027 (1967) where the author observes:

> It seems clear, however, that the purpose of an award of damages in these cases [violation of civil rights] is punitive rather than compensatory. Although the plaintiff has lost something that can never be returned—the right to vote in one election—any pecuniary recovery given him will be nothing more than a windfall.

This author's solution is to create a new category of compensatory damages which is punitive in nature, but does not require an element of malice. In this manner, he believes that a putative plaintiff will have an incentive to sue, which "incentive is important since only by encouraging frequent suits can the civil

13. Sedgwick, vol. I, p. 167.
14. Sedgwick, vol. I, p. 169.
15. Sedgwick, vol. I, p. 687.

rights statutes fully accomplish their deterrent purpose". (*Supra* at p. 1033) This concept of penalizing the defendant has been introduced into constitutional torts by the Seventh Circuit in its opinion, in this case, directing that general compensatory damages for the injury which is "inherent" in nature of the wrong shall be awarded.

Commendable though it may be to provide some form of monetary award for a plaintiff who has established a tort violation of his constitutional rights but no loss or injury, this concept ignores reality and centuries of tested and proven law. To award a prevailing plaintiff, who has suffered no actual loss, anything beyond a nominal amount of money creates a windfall, without justification in the law. Anglo-American law has always been compensation-oriented and it should remain so. The invasion of a plaintiff's rights, where no actual loss is suffered should be no more than nominal damages. This is the only damage inherent in the nature of the wrong. Most surely, the plaintiff who has suffered some individualized injury should be compensated even if only in the nature of general compensatory damages. Here, too, the existing laws of damages are more than adequate. See, for example, *Seaton* v. *Sky Realty*, 491 F. 2d 634 (7th Cir., 1974), where Judge Fairchild surveyed and reported on the types of cases justifying an award for general compensatory damages, considering such as subjective pain and suffering, humiliation, embarrassment, discomfort, mental anguish, or mental distress. These are the types of intangible injury which Sedgwick's analysis indicates are elements of compensable injury. Naturally, there can be no argument that a plaintiff who prevails in a civil rights action should not receive his special pecuniary loss.

Finally, the law of damages is surely adequate to handle the concept of a penal award. This is exactly the purpose for which the law developed punitive damages. When the defendant's acts may be characterized as gross fraud, wanton, malicious or oppressive, and it is necessary to hold him up to the community

as an example to deter him and others from like conduct, then a punitive award has always been available to serve his purpose.

The instrumentality, if any be needed, to inflict some form of penalty upon a defendant who had committed a constitutional tort, while yet avoiding the problem of creating a windfall to the plaintiff now exists in law. By Public Law 94-559, § 2, October 19, 1976, 90 Stat. 2641, Congress amended 42 U. S. C. 1988 to include the following:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce or charging a violation of, a provision of the U.S. Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

If one of the purposes of an award is to provide plaintiff the incentive to bring a suit by which the civil rights statutes can fully accomplish their deterrent purpose,[16] then the potential for an award of attorney's fees is that incentive. As this court observed in another but similar context:[17]

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal Courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advanced arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

The law of damages as it is presently constituted is fully adequate to administer the problem of an award of damages for

16. Note, Civil Actions for Damages under the Federal Civil Rights Statutes, 44 Texas L. Rev. 1015 (1967).

17. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, 19 L. Ed. 2d 1263, 1265-66 (1969).

the violation of a constitutional tort. Special or general compensation should be awarded only where there is a pecuniary loss or some individualized injury; nominal damages are available to recognize the invasion of the right; outrageous conduct runs the risk of punitive damages. More importantly, by statute, any necessary penalty or deterrent factor is now present with the availability of an award of attorney fees to the prevailing party.

Were this Court to hold otherwise, and allow damages here, the effect would be to penalize sincere civil servants and deter qualified persons from accepting these positions. It is widely recognized that school board members devote countless hours to the task of educating the young, all with little or no monetary compensation. Their reward is in the satisfaction of the accomplishment, at least equal to those who dedicate their careers to teaching. It is decisiveness and not meditation which must prevail in the classroom, if any system of orderly education is to be maintained. Sympathy for a child who has been momentarily wronged by an innocent error of judgment must not be transposed into an award of damages when he has suffered no actual injury. The administration of public schools needs trained and dedicated persons, and they will not respond to the calling if they must face the constant threat of compensating a child who has received no actual injury through some presumed violation of his civil rights.

CONCLUSION.

For the reasons set forth above, petitioners Carey, et al. respectfully request this Court to reverse the decision of the Seventh Circuit Court of Appeals and affirm the finding of the District Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.

Cases.

Statutes.

Other Authorities.

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STATEMENT OF THE CASE.

The relevant facts of the case are fully and accurately stated in the Memorandum Opinion of the District Court at A1-A4 in the Appendix to this Brief.

Petitioners' presentation of the facts is misleading because it makes the District Court's finding of bad faith due process

violations appear unwarranted. Petitioner school principals represent that their only wrongdoing consisted of an "innocent error of judgment" in causing a "presumed" and "momentary" violation of Respondents' civil rights. Petitioners' Br. p. 18. The District Court, however, found, to the contrary, that Petitioners' suspensions of Respondents for twenty school days without basic procedural safeguards required by due process of law were sufficiently obvious violations of Respondents' civil rights that Petitioners should have known they were acting unconstitutionally and were therefore liable for damages pursuant to the standards set forth in *Wood* v. *Strickland*, 420 U. S. 308 (1975).

Petitioners now apparently take issue with this holding, enigmatically characterizing it as "a retroactive finding of a violation based upon a requirement of foreseeability." Petitioners' Br. p. 8. However, Petitioners did not cross-appeal from the District Court's holding. They did not challenge it in their brief to the Seventh Circuit, 545 F. 2d 30 at 31 n. 1, and they did not raise it as an issue in their Petition for Certiorari. The procedural posture of this case thus provides no basis for disputing the District Court's holding that Petitioners were guilty of full-fledged bad faith violations of constitutional rights.

Petitioners also try to minimize the seriousness of their due process violations by misstating the heretofore unchallenged findings of fact of the District Court. Petitioners state that Respondents "acknowledged participating in the prohibited activity," Petitioners' Br. p. 8, which in the case of Piphus is said to be "smoking cigarettes," Petitioners' Br. p. 5, and in the case of Brisco, wearing an earring said to denote gang membership, Petitioners' Br. pp. 3-4. However, Piphus was suspended not for smoking a cigarette, but for smoking marijuana. Memo. Opinion A4. Although Piphus consistently denied having smoked this substance, Memo. Opinion A4, he was suspended without being allowed any opportunity to explain what he had been doing or to present exculpatory evidence, such as the cigarette

which he had discarded before he had been accused of smoking marijuana.

Although Respondent Brisco was indeed suspended for wearing an earring which allegedly denoted gang membership, Petitioners fail to mention that Brisco denied that his earring denoted such membership, but maintained instead that it was a symbol of black pride. Petitioners' Br. pp. 3-4, Memo. Opinion A3. Nevertheless, Brisco was not given any opportunity to contest his suspension by showing that his conduct did not present a threat of material disruption to the school and was therefore within the scope of First Amendment protection. Memo. Opinion A3, 8. Given the severity of the twenty-day suspensions, the District Court found that the principals should have known their failure to provide "any adjudicatory hearing of any type would violate the constitutional rights of plaintiffs." Memo. Opinion A10. Thus, rather than being "presumed" and "momentary," the constitutional violations in this case were clear cut and presented serious threats to the Respondents' educational opportunities.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourteenth Amendment to the United States Constitution (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988 of Title 42 of the United States Code:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rule 52(a) of the Federal Rules of Civil Procedure (in pertinent part):

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Section 34-18.1 of Chapter 122 of the Illinois Revised Statutes (in pertinent part):

> The board of education shall insure or indemnify and protect the board, any member of the board or any agent, employee, teacher, student teacher, officer or member of the supervisory staff of the school district against financial loss and expense, including reasonable legal fees and costs arising out of any claim, demand, suit, or judgment by reason of . . . alleged violation of civil rights . . . provided such board member, agent, employee, teacher, student teacher, officer or member of the supervisory staff, at the time of the occurrence was acting under the direction of the board within the course or scope of his duties.

SUMMARY OF ARGUMENT.

In enacting the predecessor to 42 U. S. C. § 1983 Congress intended to provide a private damage remedy for the *per se* violation of constitutional rights. The Congressional debates make clear that injury was deemed inherent in the deprivation of constitutional rights and that the damage remedy was intended to fulfill the dual purpose of providing compensation for such injury and deterring officials from violating constitutional rights in the future. The Congressional debates and the language of 42 U. S. C. § 1988, on its face and as interpreted by the Court, reveal that it was also Congress' intent that the courts use the most effective remedies available for accomplishing the Act's purpose of protecting persons in their civil rights. To make an award of compensatory damages for bad faith constitutional violations contingent upon affirmative proof of consequential injuries would defeat this intent first, by disregarding contrary precedent providing more effective protection for civil rights and second, by giving officials immunity from judicial redress for their bad faith constitutional violations not resulting in provable consequential injuries.

United States Supreme Court precedent, supported by precedent of English and American state courts, is clear that an award of damages is the most appropriate remedy for the harm inherent in the deprivation of the constitutional right to vote.

Petitioners' argument would require that the Court either reject these precedents or choose which constitutional rights as a matter of law have or do not have inherent value. This task is both without warrant in the language of the Constitution and contrary to the changing needs of society. If, however, such a choice is to be made among constitutional rights, due process of law must be deemed to have *per se* value because Congress intended that this specific constitutional right be given judicial protection under Section 1 of the Ku Klux Act of 1871. Moreover, analysis of the Court's opinions reveals that violation of procedural due process of law inevitably results in causing the plaintiff actual harm in four respects. First, it denies the opportunity to plead one's case to the original decision-maker on judgmental, discretionary or compassionate grounds. Second, it provokes feelings of frustration and hostility in the individual who has been treated arbitrarily. Third, it destroys the individual's sense of security in the right to possess and enjoy his own property free of arbitrary governmental interference. Finally, it is a cause of the deprivation of an interest in liberty or property. Although the loss of liberty or property may not always be subject to affirmative proof and may result from factors in addition to the denial of due process, it is nevertheless always present when due process is denied and always subject to amelioration by due process safeguards.

Petitioners' argument that no harm is inherent in the violation not only of procedural due process, but of *any* constitutional right would have the effect of affording judicial redress for the deprivation of often insignificant interests collaterally protected by the Bill of Rights, but no redress for the deprivation of citizens' paramount interest in the exercise of the Rights themselves. Such an approach renders purely rhetorical the Court's many decisions stating that constitutional rights protected against state infringement by the due process clause of the Fourteenth Amendment are essential to safeguard fundamental liberties of American citizenship.

Petitioners' proposed rule of no inherent injury in the bad faith violation of constitutional rights, besides disregarding precedent, would undermine effective judicial enforcement of civil rights. It is likely to be seen by some officials as an invitation to violate procedural due process because the time and bother an official would save by ignoring due process would not be counterbalanced by an award of damages in cases where the only significant harm is in the denial of the right itself. Petitioners' theory would also provide no redress for, nor deterrence against, bad faith due process violations where the consequential injuries would likely have occurred even if due process safeguards had been afforded. The Seventh Circuit's approach in giving the wrongdoing plaintiff damages only for the harm actually suffered by the deprivation of the right itself is a reasonable compromise between the extremes of Petitioners' and *Amicus'* denial of all damages and the Fourth and Fifth Circuits' award of consequential damages regardless of plaintiff's wrongdoing.

There are no alternative remedies to that of compensatory damages for the harm inherent in bad faith constitutional violations which can provide adequate redress for or deterrence against such violations. An award of nominal damages trivializes the significance of the right, does not compensate for the harm actually suffered because of the deprivation of the right itself and offers no deterrence against further bad faith constitutional violations. Compensatory damages for the harm inherent in bad faith violations of constitutional rights also has the advantage of limiting the need for federal courts to enforce compliance with constitutional rights through assuming the on-going direction of the affairs of citizens, state courts and administrative agencies.

Even if harm were not to be deemed inherent in the bad faith violation of Respondents' constitutional rights, the reversal of the District Court's denial of all damages should be upheld because that denial was based on an erroneous legal standard. In

requiring Respondents to provide affirmative evidence to quantify their injuries, the District Court applied the damage rule appropriate for breach of contract cases, rather than the rule appropriate for cases where the injuries are non-pecuniary in nature and concern such intangible interests as reputation, peace of mind, dignity, privacy and liberty. In such cases damages are awarded without proof of the extent of the harm since the harm is inferred from the circumstances of the violation. Since violations of constitutional rights in general and procedural due process in particular commonly result in such intangible harms it was reversible error for the District Court to deny Respondents damages because of their failure to quantify the extent of their injuries.

ARGUMENT.

I. The Intent of Congress in Providing a Private Damage Remedy Under Section 1 of the Ku Klux Act of 1871 Was to Afford Effective Judicial Redress for and Deterrence Against Deprivations of Constitutional Rights Regardless of Whether Consequential Injuries Could Be Proven to Have Resulted from the Deprivations.

Petitioners and *Amicus* argue that 42 U. S. C. § 1983 does not provide a compensatory damage remedy for the bad faith violation of constitutional rights in the absence of proof of injury consequential to the violation. This argument is based on the premise that Congress in enacting Section 1 of the Ku Klux Act of 1871, the predecessor to § 1983, intended to exclude from its remedial purposes the redress of constitutional rights when consequential injuries cannot be proven. Mr. Justice Harlan in his concurring opinion in *Monroe* v. *Pape*, 365 U. S. 167 (1961), recognized that such was not the intent of Congress and that to so construe it would nullify the essential purposes of the Act. Noting that the tone of the legislative history is "one of overflowing protection of constitutional rights," 365 U. S. at 196, Justice Harlan concluded that the statute becomes no more than

a jurisdictional provision unless "one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." 365 U. S. at 196.

Justice Harlan thought this view of the legislative intent was also supported by common sense, for otherwise, victims of state power relegated to state remedies will often receive relief that "will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right." 365 U. S. at 196 n. 5. In support of this point, Justice Harlan gave several examples of cases, similar to the instant case, in which there would be little or no relief if the plaintiff had to prove under state tort law the consequential losses resulting from the constitutional violation:

> "There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." 365 U. S. at 196 n. 5.

Justice Harlan's perception that the 1871 Act was intended to provide compensation for the deprivation of the constitutional right itself regardless of proof of consequential injuries is amply supported by the Act's legislative history. Proponents and opponents of the bill made clear for differing reasons their views that the damage action available under Section 1 was intended as a remedy for injuries done to the rights of citizens and not simply for the tangible losses which might flow from the violation of those rights. Representative Sheldon, in support of the bill, stated:

> "It seems to me to be sufficient, and at the same time to be proper, to make a permanent law affording to every citizen a remedy in the United States courts for *injuries to him in those rights* declared and guaranteed by the Constitution . . ." Cong. Globe, 42d Cong., 1st Sess., 368 (1871) (emphasis supplied).

Representative Kerr, an opponent of the bill, stated:

> "This section gives to any person who may have been *injured in any of his rights*, privileges, or immunities of person or property, a civil action for damages against the wrong doer in the Federal courts." Cong. Globe, 42d Cong., 1st Sess., App. 50 (1871) (emphasis supplied).

Finally, the Congressional intent to make damages available for the infringement of civil rights and not just for the injuries consequent upon such infringement is reflected in Senator Frelinghuysen's statement that under the civil remedies section "the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights." Cong. Globe, 42d Cong., 1st Sess., 501 (1871).

That the Congressmen should stress Section One's role in remedying injuries done to the rights themselves is not surprising since the sole purpose of the bill, officially titled "An Act to Enforce the Provisions of the Fourteenth Amendment," was to deter the deprivation of civil rights.[1] The bill's principal sponsor in the

1. Petitioners erroneously state that the purpose of Section 1 of the Ku Klux Act of 1871 was to provide "some form of civil remedy to redress acts of racial discrimination." Petitioners' Br. p. 10. As this Court noted in *Monroe* v. *Pape*, 365 U. S. 167, 178 (1960), the supporters of the bill were concerned about "the discrimination against Union sympathizers and Negroes in the actual enforcement of the laws." Indeed, the Act's supporters were explicit in their intent to protect the rights of all citizens:

> "This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also *to all people* where,

(Footnote continued on next page.)

House, Representative Shellabarger, made explicit the link between Section One's civil remedy and the need to enforce the Fourteenth Amendment's provision for the protection of rights:

> "The section being in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of state laws which abridge these rights, it goes directly to the enforcement of that provision which says the State shall not make or enforce any law which shall abridge any privileges or franchises of citizens." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).

In supporting the defeated Sherman Amendment to the 1871 Ku Klux Act, which would have made the inhabitants of a county, city or parish liable for damages for certain types of property destruction or violence, Representative Smith of New York made clear that the civil damages to be available under Section 1 were for the purpose of suppressing the violations being perpetrated in the South:

> "[Supporters of the bill have agreed] . . . that Congress has the power to suppress these alleged outrages in the South, that Congress has the power to make the perpetrators liable to a civil action for damages. Now, sir, if Congress has that power—the power under the Constitution to suppress these outrages—I submit that Congress has the incidental power to adopt any means which will be conducive to the end desired to be gained, to wit, the suppression of these outrages." Cong. Globe, 42d Cong., 1st Sess., 799 (1871).

Indeed, Representative McHenry, an opponent of the bill, described the civil remedy provided by Section 1 not as a compensatory or remedial measure, but as an unjustified exercise of power by Congress "[t]o enforce upon the citizen a punishment or penalty for the wrong and delinquency of a State." Cong. Globe, 42d Cong., 1st Sess., 429 (1871).

(Footnote continued from preceding page.)

> under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship."

Speech of Representative Shellabarger, Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871) (emphasis supplied).

As Representative Hawley, a proponent of the bill, observed, failure to provide effective protection for the rights guaranteed by the Constitution would render those rights worthless:

> "It [the Constitution] has no value if it will not protect me or any other citizen in the enjoyment of the rights which, under the Constitution, are pretended to be guaranteed to citizens everywhere." Cong. Globe, 42d Cong., 1st Sess., 382.

Given the legislative history of Section 1, the statement of *Amicus* that "neither the supporters nor the opponents of the legislation contemplated the possibility of an award of damages not based on actual injury," Brief of National School Boards Assoc., p. 26 (hereafter *Amicus* Brief), is at once irrelevant and misleading. The injuries for which Congress intended to provide relief were the "actual" ones inherent in the deprivation of civil rights and an action for damages was seen as one of the remedies that would provide the needed relief and the needed deterrence. The Congressional dissent that did occur over the passage of Section 1 concerned both the wisdom of affording any federal remedy for the violation of civil rights and the scope of the rights to come under that remedy. It was these issues which Senator Thurman was addressing in the passage quoted by *Amicus*, *Amicus* Br. p. 25, rather than the appropriateness of an award of nominal damages under Section 1.

Amicus' use of Senator Thurman's statement out of its context in the debates is a perfect illustration of why the Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents." *Labor Board* v. *Fruit Packers*, 377 U. S. 58, 66 (1964). When read in context, it becomes clear that Senator Thurman's fear of civil rights suits being brought under the Act for trivial damages grew out of his belief that the first section of the bill would have "the centralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal

courts." Cong. Globe, 42d Cong., 1st Sess., App. 216.[2] Senator Thurman's expansive construction and trivialization of the rights to be protected by the bill did not reflect the views of the bill's proponents.[3]

The question now at issue before the Court of whether the first section of the Act was intended to authorize compensatory damages solely for the deprivation of constitutional rights was not addressed by Senator Thurman. However, another opponent of the bill, Representative Arthur, believed it was so intended. He stated that the bill would authorize "heavy damages" against officials who innocently erred in carrying out their duties and who are sued by "any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States . . ." Cong. Globe, 42d Cong., 1st Sess. 365.

Petitioners' contention that the Act of 1871 did not contemplate the award of damages solely for the deprivation of constitutional rights not only ignores the words of the legislators in debating the Act, it also disregards settled principles of statutory construction, which the Court has applied specifically to the 1871 Act. The Ku Klux Act of 1871 is the paradigm of a remedial statute intended to cure defects in the common law. *Monroe* v. *Pape*, 365 U. S. at 173-4. The traditional rule for the judicial interpretation of remedial statutes is that the statute "should be construed liberally to carry out the wise and salutory purposes of its enactment." *Stewart* v. *Kahn*, 78 U. S. (11 Wall.)

2. In order to stress the trivial nature of the rights he feared would be brought under the protection of the Act, Senator Thurman illustrated its potential consequences with the example of a federal prosecution of two Negroes for stealing a white man's hens because, under Section 2 of the bill, they formed a combination to deprive the hen-owner of his rights of property. Cong. Globe, 42d Cong., 1st Sess., App. 219.

3. Twelve years after the Act's passage Senator Thurman's construction of the bill was held by the Court not to have been the construction intended by Congress in passing the Act. *Civil Rights Cases*, 109 U. S. 3, 17 (1883).

493, 504 (1870); *Tcherpnin* v. *Knight*, 389 U. S. 332, 336 (1967).

That Congress intended the Court to construe the 1871 Act in a remedial, result-oriented fashion was made clear by the Act's sponsor, Representative Shellabarger:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all people." Cong. Globe, 42d Cong., 1st Sess., App. 68.

The explicit terms of 42 U. S. C. § 1988 (1976) are the strongest evidence that Congress intended the courts to apply the most effective available remedies for carrying out the object of the Act, which § 1988 defined as being "for the protection of all persons in the United States in their civil rights and for their vindication." In *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 240 (1969), the Court stated that the choice of the rule of damages to be applied under 28 U. S. C. § 1343(4) is to be governed by § 1988's policy requiring use of the most effective remedy:

> "This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier* v. *Cherry*, 293 F. 2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."

This policy of choosing the most effective available remedies for the protection of civil rights received its most recent legislative affirmation in the Senate Committee Report for the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, which stated:

> "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." S. Rpt. No. 94-1011, 94th Cong., 2nd Sess., pt v, 3 (1976).

In sum, it was and is the intent of Congress that the rule of damages in civil rights cases under 42 U. S. C. § 1983 is to be that rule which most effectively carries out the goals of compensating for and deterring violations of civil rights. The rule for which Petitioners contend, which would deny any compensatory damages to the plaintiff who can prove no injury other than that inherent in the bad faith violation of his constitutional right itself, is not the most effective rule available for achieving the goals of § 1983. As discussed below, it would first disregard established common law precedent awarding compensatory damages for the harm inherent in the violation of constitutional and other personal rights and second, it would undermine the Congressional intent both that citizens be compensated for the deprivation of their civil rights and that officials be deterred from violating those rights.

II. The Common Law Has Long Provided a General Compensatory Damage Remedy for the Intangible Harms Inherent in the Violation of Certain Types of Personal Rights.

There is no dispute in this case that under the common law compensatory damages can be awarded only for actual losses. The bad faith deprivation of Respondents' constitutional right to due process of law, however, inflicted an actual loss. In maintaining that Respondents suffered no more than a technical violation of right with no attendant loss of anything of value, Petitioners and *Amicus* ignore or discount long-settled English and American common law precedent.

Decisions dating back to the *Magna Carta Cases*,[4] establish the common law rule that damages are the appropriate remedy for the intangible injuries that inevitably result from the violation of an individual's legally protected interests in personal

4. During the eighteenth century the English courts, in a series of cases since dubbed "The Magna Carta Cases" (Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345, 363 (1931)), upheld the right of a citizen to collect damages for a violation of his civil rights where the only injury was the deprivation of a right. In these cases the courts explicitly recognized that compensation must be given for an injury to a right and that money damages were a necessary deterrent to future violations.

In the leading case of *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320 (1703), the trial court awarded damages of 200 *l* where the only injury to plaintiff was a violation of his right to vote. Though the judgment of the trial court was arrested by the King's Bench, Lord Holt dissenting, the House of Lords reinstated the trial court's verdict, adopting the opinion of Lord Holt that the deprivation of a civil right imports an injury compensable in money damages even though that injury is difficult to prove. Equally stressed by Lord Holt was the deterrent aspect of a damage remedy, for "to allow this action will make public officers more careful to observe the constitution of cities and boroughs." 2 Ld. Raym. at 956.

The defendant in *Huckle* v. *Money*, 2 Wils. 205 (1763), moved for a new trial on the ground that damages of 300 *l* were excessive where the defendant, acting under a general warrant issued by the Secretary of State, detained the plaintiff for several hours, but "used him very civilly by treating him with beef steaks and beer," 2 *id.* at 205, thus inflicting scant injury. The court denied the motion because "the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at trial; they saw a magistrate over all the King's subjects exercising arbitrary power, violating *Magna Charta* and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant before them; . . . to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the *Spanish* inquisition, a law under which no *Englishman* would wish to live an hour; . . . I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages." 2 *id.* at 206-207.

Similarly, in *Beardmore* v. *Carrington*, 2 Wils. 244 (1764), the court upheld an award of 1000 *l* damages where plaintiff's home had been searched and plaintiff arrested by defendants acting under

(Footnote continued on next page.)

security, liberty, dignity and the exercise of the essential rights of citizenship. Courts have long recognized in these cases that the extent of the loss is not subject to any type of objective quantification and that if there is to be any remedy at all, damages must be presumed from the fact of the wrongdoing. McCormick, *Handbook on the Law of Damages*, 53 (1935); Dobbs, *Handbook on the Law of Remedies*, 528-531 (1973). The most widely cited authority for this principle is *Ashby* v. *White*, *supra* p. 16 n. 4, in which Chief Justice Holt stated, in response to the objection that plaintiff suffered no hurt from the violation of his right to vote:

> ". .. but surely every injury imports a damage though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary but an injury imports a damage, when a man is thereby hindered of his right." 2 Ld. Rymd, at 955.

Chief Justice Holt's conclusion as to the damages inherent in the violation of a citizen's right to vote has been accepted by American courts without dissent. Although state courts in the

(Footnote continued from preceding page.)

a general warrant. The court noted that in cases involving a person's liberty damages are not readily quantified:

> "[C]an any body say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects; we cannot say the damages of 1000 *l* are enormous; . . ." 2 *id.* at 250.

In *Wilkes* v. *Wood*, Lofft 1 (1763), and *Redshaw* v. *Brook*, 2 Wils. 405 (1769), plaintiffs were awarded 1000 *l* and 200 *l* respectively where defendants, acting under general warrants, had entered and searched the plaintiffs' homes. Though the defendants in both cases "did very little damage and behaved well enough" 2 Wils. at 405, the courts found such damage awards justified in light of the need to compensate plaintiffs for the violation of their rights and "to deter [government agents] from any such proceedings for the future." Lofft at 19.

In passing Section 1 of the Ku Klux Act of 1871 Congress acted in full awareness of this English common law background and especially of the rights which grew out of *Magna Carta* (see speech of Representative Hoar, Cong. Globe, 42d Cong., 1st Sess., 332-333).

nineteenth century differed over whether election officials' liability for damages, depended on proof of improper motive, they never questioned that damages were the proper form of remedy for the illegal denial of the right to vote. See, Annotation, *Personal Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*, 153 A. L. R. 109, 115 (1944). The rationale for the damage remedy in voting rights cases was set forth with the greatest clarity by Chief Justice Parker in *Lincoln* v. *Hapgood*, 11 Mass, 350, 354 (1814):

> "[T]he right of voting in such a government as ours, is a valuable right; it is secured by the constitution; it cannot be infringed without producing an injury to the party; and although the injury is not of a nature to be effectually repaired by a pecuniary compensation, yet there is no other indemnity which can be had. In such a case, as in the case of an injury to the reputation and sometimes to the feelings, the good of society, and, security against a repetition of the wrong, require that the suffering party should be permitted to resort to this mode of relief.
>
> . . . .
>
> "Upon the whole, we see no better way, than to leave cases of this kind to the jury, under the direction of the Court; nor have we any doubt that a correct public sentiment will apply the remedy in each case, proportionately to the offense; so that, on one hand, a man who has been without any fault of his own, deprived of a valuable privilege, should find indemnity and protection in the laws; and on the other, that men who are in places of public trust, should not be subject to too severe a penalty, for an involuntary failure in a proper performance of their duty."

The right to recover damages solely for the violation of the citizen's constitutional right to vote has also been repeatedly recognized by the federal courts. Most frequently cited in this regard is *Nixon* v. *Herndon*, 273 U. S. 536 (1927), which reversed the dismissal of a complaint alleging $5,000 in damages for the unconstitutional denial of plaintiff's right to vote in a primary election. Citing *Ashby* v. *White* and prior decisions of this Court, Mr. Justice Holmes stated:

> "[T]hat private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years . . . and has been recognized by this court." 273 U. S. at 540.

The fact that *Nixon* did not determine the actual amount of damages to be awarded for the violation of the right to vote does not diminish the opinion's significance as an affirmance of the principle that damages are an appropriate remedy where there is no deprivation alleged other than the violation of the constitutional right.

Mr. Justice Holmes recognized in *Giles* v. *Harris*, 189 U. S. 475 (1903), that damages are a uniquely appropriate remedy for the violation of certain political rights, such as the right to vote. The Court in that case refused to order election officials to enroll plaintiffs on the voting lists on the grounds that such equitable relief was not contemplated by § 1979 Rev. Stats., the predecessor of 42 U. S. C. § 1983. However, the Court pointed out that "[t]he deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money," 189 U. S. at 485, but that "apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." 189 U. S. at 488.

The advantage of the damage remedy over injunctive relief in cases involving political rights was also emphasized by Justice Frankfurter in *Colegrove* v. *Green*, 328 U. S. 549, 552 (1946) and *Coleman* v. *Miller*, 307 U. S. 433, 469 (1939). In the latter case, Justice Frankfurter viewed the scope of relief available for voting rights violations as determined solely by the availability of the damage remedy:

> " 'Private damages' is the clue to the famous ruling in *Ashby* v. *White*, supra, and determines its scope as well as that of cases in this Court of which it is the justification. The judg-

ment of Lord Holt is permeated with the conception that a voter's franchise is a personal right, assessable in money damages, of which the exact amount is 'peculiarly appropriate for the determination of a jury', see *Wiley* v. *Sinkler*, 179 U.S. 58, 65, and for which there is no remedy outside the law courts." 307 U. S. at 469.

The relevance of the damage principles articulated in the Court's voting rights cases has not been confined to the area of voting. In *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 396 (1971), the Court recognized that its voting cases are authority for the proposition that damages are an appropriate remedy generally for violations of rights protecting liberty interests:

> "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Nixon* v. *Herndon*, 273 U.S. 536 540 (1937); *Swafford* v. *Templeton*, 185 U.S. 487 (1902); *Wiley* v. *Sinkler*, 179 U.S. 58 (1900) . . . "

The principle recognized in the Court's voting rights cases of awarding compensatory damages for the harm inherent in the deprivation of constitutional rights has been applied by lower federal courts with respect to a variety of constitutional rights. In *Tatum* v. *Morton*, No. 76-1187 (decided August 10, 1977 and, as yet unreported) the United States Court of Appeals for the District of Columbia reversed the district court's limitation of damages to $100. per plaintiff for the violation of their First Amendment right to demonstrate peacefully outside the White House. The Court of Appeals found that the district court's reasons for limiting damages—the favorable publicity the plaintiffs' unlawful arrests caused and plaintiffs' failure to mitigate damages by posting bond to secure release from custody—did not give sufficient importance to the value of the exercise of the First Amendment right itself:

> "The right to demonstrate is a significant strand of the cluster of First Amendment rights. The vindication of these

> rights warrants more than token acknowledgment . . . . Compensatory damages embrace more than recompense for monetary injury, however, as is evident from amounts for pain, suffering and humiliation. Compensation for denial of First Amendment rights should not be extravagant, say to the point of awarding the equivalent of what would be a year's, or even six month's compensation for the average person. Correspondingly such a compensation award should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right to demonstrate. The district court's 'limited' approach cannot stand." Slip Opinion, pp. 6-7.

In *Magnett* v. *Pelletier*, 488 F. 2d 33 (1973), the First Circuit reversed and remanded the district court's award of $500 damages for an unlawful search as inconsistent with the finding that nominal damages were warranted. The Court of Appeals stated, contrary to the interpretation of its decision urged by *Amicus*, *Amicus* Br. p. 27:

> "This is not to say that in a civil rights action a plaintiff who proves *only an intangible loss of civil rights* or purely mental suffering may not be awarded substantial compensatory damages." 488 F. 2d at 35 (emphasis supplied).

The district court was directed to decide whether nominal damages or $500 general compensatory damages were warranted.

In *Manfredonia* v. *Barry*, 401 F. Supp. 762 (E. D. N. Y. 1975), defendant police officers were found liable for damages for unlawful arrests. Although plaintiffs failed to show any consequential injury resulting from their arrests, the court awarded $3500 compensatory damages and $500 punitive damages to each plaintiff, stating that:

> "[S]uch familiar elements of damage, however, need not be shown in order to justify a reasonably substantial compensatory award in a civil rights case. (cite omitted) It is sufficient to establish, as plaintiffs have succeeded in doing here, a deprivation of constitutional rights through misuse of official power." 401 F. Supp. at 770.

In *Sexton* v. *Gibbs*, 327 F. Supp. 134 (N. D. Tex. 1970), *aff'd* 446 F. 2d 904 (5th Cir. 1971), although plaintiff did not claim or prove "actual damages of any specific amount," the court awarded $500.00 and $250.00 for a Fourth Amendment violation stating: "However, there is no doubt that Plaintiff suffered humiliation, embarrassment and discomfort in addition to being deprived of his federally protected rights as set forth above." 327 F. Supp. at 143.

The Seventh Circuit's rule of damages for violations of civil rights was explicitly adopted by the district court in *Bruce* v. *Board of Regents of N. W. Mo. State Univ.*, 414 F. Supp. 559, 568-569 (W. D. Mo. 1976), where defendants had failed to provide plaintiff with a due process hearing in an attempt to rescind his sabbatical leave contract. In *United States ex rel. Neal* v. *Wolfe*, 346 F. Supp. 569 (E. D. Pa. 1972), plaintiff was placed in prison segregation without a prior hearing. The court awarded $25 for each day in segregation plus damages of $114.60 for actual injuries since plaintiff was entitled "to recover damages against state officials for violation of his constitutional rights." 346 F. Supp. at 576.

In *Rhoads* v. *Horvat*, 270 F. Supp. 307 (D. Colo. 1967), the court found that the unlawful arrest of plaintiff entitled him to compensatory damages of up to $5,000 even though no evidence of consequential injuries was shown. The court recognized that "it is open to the jury in a case such as this to make a determination as to the amount that plaintiff is entitled to be awarded for the deprivation." 270 F. Supp. at 310.

Amicus argues that the federal courts have not traditionally awarded general compensatory damages for constitutional violations without affirmative proof of actual injuries. *Amicus* Br., pp. 16-23. However, six of the eight cases cited by *Amicus* do not discuss or in any way concern the issue of whether damages may be awarded for the violation of constitutional rights without proof of consequential injuries. The two cited cases which are relevant to this question. *Smith* v. *Losee*, 485 F. 2d 334 (10th

Cir. 1973) *(en banc), cert. denied* 417 U. S. 908 (1974), and *Stolberg* v. *Members of Board of Trustees for State Colleges of Connecticut*, 474 F. 2d 485 (2nd Cir. 1973), although they do not specifically address the issue decided by the Seventh Circuit, do deny damages for due process violations because plaintiffs failed to sustain the burden of proving the actual injuries which they claimed.

More recent cases indicate, however, that both the Tenth and Second Circuits no longer require affirmative proof of consequential injuries in order to award compensatory damages for the violation of constitutional rights. In *Unified School District No. 480* v. *Epperson*, 551 F. 2d 254 (10th Cir. 1977), the Tenth Circuit found that a terminated teacher's due process rights had been violated and remanded the case for the purpose of assessing damages. The court stated that the Seventh Circuit's decision in *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (1975), *cert. denied* 425 U. S. 963 (1976), which awarded damages for the harm inherent in the violation of constitutional rights, sets forth the proper rule of damages in such cases. Such a rule, the court said, was necessary to make the constitutional right meaningful:

> "To reach a contrary result in the instant case would to us be a bit incongruous, in that we would be holding that there was no relief or remedy whatsoever for an admitted violation of a constitutional right. The right to notice and a hearing before termination or nonrenewal of a teaching contract, assuming the particular individual enjoys such a right, is an important one, and to hold that such a right may be violated without affording the injured party any redress of any kind tends to deprive the right of meaning." 551 F. 2d at 260-261.

In *United States ex. rel. Larkins* v. *Oswald*, 510 F. 2d 583 (2d Cir. 1975), the plaintiff-prisoner was not given a due process hearing before being placed in segregation for twelve days, which was longer than prison regulations permitted. In affirming the $1,000 compensatory damage award as not ex-

cessive, the court cited no affirmative evidence as to the injury suffered, but inferred the emotional and dignatory harm from the circumstances of the violation. The unduly long confinement the court said "undoubtedly must have created an anguish and anxiety or fear of indefinite confinement to segregation, matters for which he was entitled to be justly compensated." 510 F. 2d at 590. The court noted the difficulty of assessing the psychological impact of the solitary confinement and said the matter was for the jury's determination: "Particularly in a civil rights case the amount of damages is a question for the jury's determination. *Basista* v. *Weir*, 340 F. 2d at 88, *quoting from Wayne* v. *Venable*, 260 F. 64, 66 (8th Cir. 1919)." 510 F. 2d at 589.

Wayne v. *Venable*, a leading voting rights case, best summarizes the approach of the common law towards granting relief for the deprivation of a personal right protected by the Constitution:

> "In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. *Scott* v. *Donald*, 165 U.S. 89, 17 Sup. Ct. 265, 41 L. Ed. 632; *Wiley* v. *Sinkler*, 179 U.S. 58, 65, 21 Sup. Ct. 17, 45 L. Ed. 845." 260 F. at 66.[5]

5. *Amicus* would dismiss the Eighth Circuit's decision in *Wayne* on the grounds that it incorrectly cites the Court's decision in *Wiley* v. *Sinkler*, 179 U. S. 58 (1900) and *Scott* v. *Donald*, 165 U. S. 58 (1897). *Amicus* Br., pp. 31-33. These two cases, however, do support the proposition for which *Wayne* cited them. The Court in *Wiley* explicitely rejected the district court's rationale for dismissing the complaint on the grounds that a verdict of $2,000 for the violation of voting rights would be excessive and therefore did not meet the jurisdictional amount. The Court stated, to the contrary, that in an action for damages based on a violation of civil rights, the "amount of damage the plaintiff shall recover in such an action is

(Footnote continued on next page.)

III. Harm Is Inherent in the Deprivation of Procedural Due Process of Law.

As shown above, the Court has established that deprivation of the constitutional right to vote will entitle plaintiff to damages without proof of injury other than the deprivation itself. Acceptance of Petitioners' argument that no compensable harm is inherent in the violation of due process of law thus would require the Court to determine as a matter of law which constitutional rights have inherent compensable value and which do not. Since various constitutional rights have been perceived to have different degrees of relative social and personal importance at different stages in the country's history, it is crucial that the determination of their relative value to those who suffer from their deprivation be made by the trier of fact in the context of the circumstances of the individual case. The Court's acceptance of Petitioners' invitation to classify as a matter of law certain constitutional rights as having no inherent value would have no basis in the language of the Constitution and would tend to make the Bill of Rights into a static document affording no opportunity for development to meet changing social conditions.

Assuming, however, that a choice had to be made between constitutional rights which as a matter of law have and do not have inherent compensable value, Petitioners' selection of due process as having no such value would, along with equal protec-

(Footnote continued from preceding page.)

peculiarly appropriate for the determination of the jury." 179 U. S. at 65. The Court in *Nixon* v. *Herndon*, 273 U. S. 536 (1927) cited *Wiley* for the same proposition for which it was relied upon in *Wayne* v. *Venable*.

The Court in *Scott* v. *Donald*, 165 U. S. 58 (1897), did, as *Amicus* points out, hold that exemplary damages may be awarded for the malicious violation of "personal rights and privileges secured to the plaintiff by the Constitution of the United States." However, in reaching that conclusion the Court also recognized that the *per se* violation of Constitutional rights is also the proper subject of an award of regular compensatory damages in that such a violation constitutes "injury not the subject of compensation by a *mere* money standard." 165 U. S. at 89 (emphasis supplied).

tion of the law, be the least justifiable choice. The very title of the 1871 Act, "An Act to Enforce the Provisions of the Fourteenth Amendment," as well as the Congressional debates, make clear that due process of law was intended to be one of the rights to be afforded specific protection under the Act. Thus, a holding that due process of law is not one of the constitutional rights the *per se* violation of which causes sufficient harm to qualify for redress under § 1983 would be the opposite of what Congress intended.

Even without reference to legislative intent, it is clear from the Court's opinions that there is substantial harm inherent in the violation of due process of law. Petitioners and *Amicus* portray this right as a technical requirement having marginal significance for school children[6] and society, e.g. Petitioners' Br. p. 18, *Amicus* Br. p. 46. The Court, however, has repeatedly taken the contrary view: that procedural due process is more than a formality unrelated to immediate, concrete and deeply felt interests of the individual.

Mr. Justice Stewart has pointed out with respect to the constitutional right to be heard:

> "The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantially unfair or mistaken deprivations of property . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, imbedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference." *Fuentes* v. *Shevin*, 407 U. S. 67, 80-81 (1972).

6. The amount of litigation spawned by public school educators in order to establish their right to procedural due process of law when their own jobs are at stake makes it doubtful whether most educators would agree that the violation of this constitutional right is a mere "technicality" were their own jobs to be terminated with the same peremptory abruptness with which Petitioners terminated Respondents' right to attend school.

Mr. Justice Frankfurter made clear that procedural due process is concerned not with the technicalities of process, but with its effects on protecting the individual's profound interest in just treatment at the hands of the government:

> "But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess." *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162 (1951) (Frankfurter, J. concurring.)

The precise nature and extent of the harm an individual suffers when he is deprived of procedural due process of law depend upon the circumstances of each case. However, the case law does reveal that the harm inherent in the violation of due process has four distinct elements. First is the loss of the individual's opportunity to convince the government before it acts against him that its proposed actions are unwarranted. After the government has acted against the individual he may have judicial review of the factual accuracy of the administrative determination; but the court cannot substitute itself for the administrator in the discretionary or judgmental areas of decision-making, such as policy formulation, experimentation and risk-taking or the exercise of trust and mercy based on individual circumstances. *Skehan* v. *Board of Trustees of Bloomburg State Col.*, 501 F. 2d 31, 40 (3rd Cir. 1974) *vacated on other grounds*, 421 U. S. 983 (1975); *Morrissey* v. *Brewer*, 408 U. S. 471, 479-480 (1972).

If the individual cannot plead his case on discretionary, judgmental or compassionate grounds before the administrator has

taken a position against him and can therefore present his side only in the narrow hearing affordable by judicial review for questions of adjudicative fact, he has lost a major opportunity for the protection of his liberty or property interests. Had Respondent Piphus been suspended for smoking cigarettes, as Petitioners maintain, Petitioners' Br. p. 5, rather than for smoking marijuana, as the District Court found, Memo. Opinion A4, this opportunity to plead to the administrator's sense of fairness and professional judgment would have become of far greater importance than the opportunity to show that he did not commit the offense charged. If Piphus had been able to use such opportunity to present the school principal, or preferably an official other than his accuser, with evidence that smoking cigarettes where the principal caught him was commonly done, that all other school personnel overlooked such conduct, that no student had been suspended for smoking cigarettes there before, and that a twenty-day suspension was the penalty reserved for the most serious breaches of school discipline, the school official may well have decided that a month long suspension would be overly harsh. Indeed, the fact that after Piphus had served eight days of his suspension the District Superintendent reviewed the situation and decided to reduce its length from twenty to five days, Memo. Opinion A4, demonstrates that had Piphus been given an opportunity to present his side of the story, even the principal may well have come to the same considered conclusion as his superior: that anything longer than a five-day suspension would be too harsh.

It can never be known, of course, after a due process violation has occurred what, if anything, the exercise of such an opportunity to plead one's cause on judgmental or discretionary grounds would have availed. The denial of that opportunity, however, constitutes an unmistakable loss to the plaintiff, which, although uncertain in extent, is certain in fact and therefore subject to monetary compensation. *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544, 561 (1941); *Wachtel* v. *National Alfalfa Journal Co.*, 190 Ia. 1293, 176 N. W. 801, 805 (1920).

A second source of the harm inherent in the violation of due process is in the inevitable reactions of hostility and indignation which are provoked in the individual when he is not accorded basic fairness by the government Cf. *Morrissey* v. *Brewer*, 408 U. S. 471, 484 (1971); *In Re Gault*, 387 U. S. 1, 26 (1967). "The feeling . . . that justice has been done," which Justice Frankfurter found "so important to a popular government," *Joint Anti-Fascist Refuge Committee* v. *McGrath*, 341 U. S. 123, 172 (1951), is equally important to sustain the sense of individual dignity and equality under the law which the Fourteenth Amendment was intended to guarantee to all citizens. The affront to personal dignity that naturally arises when the individual is rendered helpless to challenge the government's taking of his interests in property or liberty comprehends the feelings of humiliation, distress and outrage which are traditionally awarded as general damages for dignatory torts. Cf. Dobbs, *Handbook on the Law of Remedies*, 139, 531 (1973).

A third source of harm inherent in the violation of procedural due process arises from the fact that the individual who becomes the focus of lawless official action loses the assurance that the government affords all of its citizens a degree of security for their basic liberty and property interests. Maintaining security in the possession of one's property is one of the oldest and most valued functions of our legal system, as the Court noted in *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972):

> "[I]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

When the individual is deprived of property without due process of law he can no longer rely on the assurance found in the common law and the Constitution that he may enjoy what he believes is his, free of arbitrary governmental interference. *Fuentes* v. *Shevin*, 407 U. S. 67, 81 (1971). *Fuentes* makes clear that this loss of security in one's entitlements is inherent in the deprivation of due process; that the arbitrary taking itself is an element of damage separate from the value of the property taken:

> "At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." 407 U. S. at 81-82.

Indeed, if this were not the case, and the denial of prior notice and hearing before a deprivation of entitlement resulted only in a loss that could be fully compensated by a post-deprivation compensation for the wrongfully taken entitlement, then the Court has indicated that the deprivation would not constitute a violation of due process. *Ingraham* v. *Wright*, ... U. S. ....., 97 S. Ct. 1401, 1416 and dissenting opinion of Stevens, J., at 1428 (1977).

A final type of harm inherent in the violation of procedural due process is found in the actual liberty or property interests which are lost because of the arbitrary governmental action. These losses can usually be classified as consequential injuries which are subject to affirmative proof, such as the monetary value of personal property arbitrarily seized, the loss of freedom from an arbitrary probation revocation or, as in the instant case, the value of the educational services missed because of the arbitrary suspensions. These consequential injuries are not inherent in the nature of the violation and their extent, if any, depends entirely on the facts of the individual case.[7] However, where there is a violation of due process, but the consequential injuries are not subject to affirmative proof, the violation, contrary to Petitioners' contention, still subjects the plaintiff to harm. Indeed, it could not be otherwise for a prerequisite for the judicial finding of a due process violation is the deprivation of a significant interest which could have been protected by the provision of proce-

7. The Seventh Circuit's reversal of the District Court's denial of damages for plaintiff's consequential injuries in the face of affirmative proof of their extent was not presented to the Court as an issue on certiorari.

dural safeguards. For example, the student who is expelled without a hearing from public school, but who loses no education because he immediately attends a tuition-free private school of equivalent or higher caliber, in all likelihood cannot prove that he suffered any consequential educational injury from the suspension. Nevertheless, there is no doubt that the expulsion itself necessarily caused intangible harm in the opportunity foreclosed, the stigma imposed and the indignity suffered. While these intangible injuries may in certain cases be subject to affirmative proof, under common law damage principles they need not be so proved in order to be compensable where they are the ordinary consequence of the violation. McCormick, *Handbook on the Law of Damages*, 54 (1935).

In sum, Petitioners' and *Amicus'* argument that there is no harm caused by the violation of procedural due process in the absence of affirmative proof of consequential injuries first, ignores the deprivation of the liberty or property interests without which there could be no due process violation and second, ignores the several harms which flow directly from government officials' bad faith failure to observe basic standards of fairness when they deprive people of their liberty and property interests.

IV. Petitioners' Argument That There Is No Harm Inherent in the Violation of Any Constitutional Right Protected Against State Infringement by the Fourteenth Amendment Denies the Essential Role Which Courts Have Given the Bill of Rights in Safeguarding Important Personal Liberties.

Petitioners' and *Amicus'* argument that there is no harm caused by the violation of *any* constitutional right in the absence of proof of consequential injuries, Petitioners' Br. p. 16, *Amicus* Br. p. 22, ignores not only the clear precedent of the voting rights cases, but also the very harms the Bill of Rights was intended to prevent. In so doing, Petitioners and *Amicus* would have the courts find value in the sometimes insignificant collateral consequences of the violations of constitutional rights, but no value

in the exercise of the rights themselves. Hypothetical First, Fourth, Fifth and Sixth Amendment violations will illustrate the serious implications of this inversion of values.

If a school official had seized and destroyed Respondent Brisco's earring, instead of suspending him for wearing it, and if the District Court had subsequently held that the school official should have known that Brisco was correct in maintaining that his wearing the earring was a symbol of black pride that would not materially disrupt the operation of the school, this finding of a bad faith First Amendment violation would entitle Brisco, according to Petitioners' and *Amicus*' theory, to recover for the value of the destroyed earring, but not for the value of his right to express symbolically his ethnic pride. Similarly, an Orthodox Jewish prisoner whose First Amendment right to freedom of religion is violated by prison authorities who in bad faith destroyed his ritual skullcap and prayer shawl would, according to Petitioners' and *Amicus*' theory, be entitled by proof of this violation to compensation for the value of the clothing, but not for the value of his constitutional right to follow the dictates of his religion.

In a similar fashion Petitioners' and *Amicus*' theory turns the Fourth and Fifth Amendments on their heads by valuing collateral consequences of the rights, but not the rights themselves. A law enforcement official breaks into a citizen's home undetected, secretly photocopies his personal diary and introduces the diary in evidence at a trial, at which the citizen is convicted, although not on the basis of information in the diary. According to Petitioners' and *Amicus*' theory, the citizen would be entitled to compensation for proven physical damage to his property or for personal embarrassment, but not for the deprivation of the primary interest intended to be protected by the Fourth Amendment—personal security in one's home and private possessions. Furthermore, because the violation of the citizen's privilege against self-incrimination did not directly cause his conviction, according to the theory propounded by *Amicus*, *Amicus* Br.

p. 17, the citizen would be entitled to no compensation whatever for the violation of this Fifth Amendment right since there would be neither consequential nor inherent harm in that violation.

In discussing the significance for the United States Constitution of Lord Camden's judgment in *Entick* v. *Carrington and Three Other King's Messengers*, 19 Howell's State Trials 1030 (1765), Justice Bradly in *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), exposes the fallacy of Petitioners' and *Amicus*' theory of no inherent harm in the violation of the Fourth and Fifth Amendments:

> "[I]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."

A final illustration of how Petitioners' and *Amicus*' theory eviscerates the meaning of constitutional safeguards is that of a sheriff who, believing a citizen is guilty of murder, locks him up for the minimum five-year murder sentence, but does not first bother with affording the citizen the "technical" rights of a trial. If it is subsequently determined that the citizen indeed committed the murder and would have been sentenced to at least five years in jail had he been afforded a trial, Petitioners' and *Amicus*' theory compels the conclusion that no redress would be available for the violation of the citizen's rights guaranteed by the Sixth Amendment. Mr. Justice Black's statement that "it is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal," *In Re Oliver*,

333 U. S. 257, 278 (1948), is thus rendered mere verbiage under Petitioners' theory that constitutional rights can have no inherent value of their own.[8]

Petitioners' "no inherent value" theory of constitutional rights depends upon acceptance of the proposition that the deprivation of a constitutional right is a purely technical violation, like walking across someone's grass. In this respect it is an expression of profound cynicism towards the seriousness of the Court's many opinions expressing the value of the due process clause of the Fourteenth Amendment in maintaining certain minimal standards which are "of the very essence of a scheme of ordered liberty. . ." *Adamson* v. *California*, 332 U. S. 46, 65 (1947) (Frankfurter, J. concurring, quoting from *Palko* v. *Connecticut*,

8. Additional examples of other types of constitutional violations where the real injuries if not deemed inherent in the wrong, are not likely to be compensated at all, are set forth in Justice Harlan's concurrence in *Monroe*, *supra* p. 9, and in the following comments of Professors Yudof and Black:

> "In constitutional adjudications, as in life itself, we rarely can know the specific and long-term consequences of a discrimination. The injury, of necessity, can be described only with reference to the resource discrimination itself—fewer street lights, less experienced teachers, lack of a transcript. It is virtually impossible to determine the long-term impact that absolute or relative denial will have on a person's life. If the class discriminated against has the burden of demonstrating some ultimate harm beyond the discrimination itself, it will rarely if ever succeed in constitutional litigation. The courts have wisely concluded that in the absence of a rational or compelling justification, those who engage in the discrimination must bear the burden of demonstrating its harmlessness." Yudof, *Equal Education Opportunity and the Courts*, 51 Tex. L. Rev. 411, 484 (1973).
>
> "To have a confession beaten out of one might in some particular case be the beginning of a new and better life. To be subjected to a racially differentiated curfew might be the best thing in the world for some individual boy. A man might ten years later go back to thank the policeman who made him get off the platform and stop making a fool of himself. Religious persecution proverbially strengthens faith. We do not ordinarily go that far, or look so narrowly into the matter." Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L. J. 421, 428 (1960).

302 U. S. 319, 325 (1937). See for example, *Holden* v. *Hardy*, 169 U. S. 366, 389-390 (1898); *Powell* v. *Alabama*, 287 U. S. 45, 67 (1932); *Duncan* v. *Louisiana*, 391 U. S. 145, 148-149 (1968); *Schneider* v. *State*, 308 U. S. 147, 161 (1939). The consistency with which the court over the last century has affirmed the role of the Fourteenth Amendment in incorporating the protection of "those fundamental rights which belong to citizenship," *In re Kemmler*, 136 U. S. 436, 448 (1890), compels the conclusion that the Court was not merely exercising rhetoric in these opinions, but rather, was acknowledging the substantial value to the individual and to society of the Fourteenth Amendment's guarantee of due process of law. If this conclusion is true, then Petitioners' argument that the deprivation of due process of law guaranteed by the Fourteenth Amendment is not an actual loss cannot be true.

V. Denial of Damages for the Harm Inherent in the Bad Faith Deprivation of Constitutional Rights Would Undermine Congressional Policy in Favor of the Most Effective Judicial Enforcement of the Civil Rights Laws.

A. To Deny Plaintiffs Whose Due Process Rights Have Been Violated Any Damages Because They Cannot Prove Either the Extent of Their Consequential Injuries or That Consequential Injuries Resulted Solely from the Denial of Due Process Would Contradict Congressional Intent That § 1983 Provide Incentives Both for Citizens to Vindicate Their Constitutional Rights and for Officials to Respect Those Rights.

Denial of damages for bad faith violations of constitutional rights to plaintiffs who cannot prove their consequential injuries with reasonable certainty leaves citizens without a remedy for what, as noted above, can be the most serious possible violations of constitutional rights. It also provides no deterrence against future bad faith violations in direct contravention of the goals of Congress in enacting Section 1 of the 1871 Act. For example, a school superintendent who takes a narrow cost-benefit ap-

proach towards the management of his schools, upon realizing that the time and bother required of his staff to afford due process to students will not be counterbalanced by any off-setting court imposed sanctions, may well decide that not to require his staff to afford due process in discipline is the most rational, cost-effective approach. Cf. Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official,* 49 S. Cal. L. R. 1322, 1378-1379 (1976). The denial of all damages by the District Court below, despite its finding of a bad faith constitutional violation, can only be seen by school officials who share this management perspective as an invitation to ignore the bother of procedural due process. It was clearly not the intent of Congress in enacting the 1871 Act that government officials should be able to decide whether or not to violate constitutional rights free of any concern for the consequences of federal civil damage suits.

In addition to plaintiffs who cannot affirmatively prove consequential injuries from the violation of their rights, a second class of plaintiffs who would be denied any remedy for bad faith constitutional violations under Petitioners' and *Amicus'* theory are those who have been deprived of a property or liberty interest without procedural due process of law, but who would likely have been so deprived had they been afforded due process in the first place. According to the theory of both *Amicus, Amicus* Br. pp. 17-18, and the Seventh Circuit unless the plaintiff can establish causation—that but for the due process violation the deprivation of property or liberty would not have occurred—he cannot recover for the consequential injuries resulting from that violation.[9] *Hostrop* v. *Bd. of Jr. College Dist., No.*

9. As noted in the *Amicus* brief, pp. 17-18, n.6, an analogous situation was recently before the Court in *Mt. Healthy School District* v. *Doyle,* ..... U. S. ....., 97 S. Ct. 568 (1977). In that case an order of reinstatement and back-pay for a teacher who had been dismissed partly as a result of First Amendment conduct was reversed by the Court on the grounds that such relief would not be warranted if the school had valid not uncon-

(Footnote continued on next page.)

515, 523 F. 2d 569, 579-580 (7th Cir. 1975), *cert. denied,* 425 U. S. 963 (1976); *Piphus* v. *Carey,* 545 F. 2d 30, 32 (7th Cir. 1976). When this rule as to consequential damages is coupled with the Petitioners' and *Amicus'* theory denying damages for the violation itself, then the probably guilty plaintiff has no legal grounds to complain of his due process violation. It is as if the violation did not occur. Thus, the school administrator who is confident that, if sued, he can show that the plaintiff in fact violated a school rule need not bother with the formality of a hearing before expelling the student, just as a sheriff need not bother with the formality of a trial before locking up the person he knows he can show to be a heinous culprit.

With regard to the wrongdoing plaintiff whose procedural due process rights are violated, the Seventh Circuit has adopted a middle position between that advocated by Petitioners and *Amicus,* who would deny such plaintiff all damages under any circumstances, and that adopted by the Fourth and Fifth Circuits, which would award damages for the injuries consequential to the violation, even though the plaintiff would have suffered those injuries had due process been granted. *Zimmerer* v. *Spencer,* 485 F. 2d 176, 179 (5th Cir. 1973); *Horton* v. *Orange County Board of Education,* 464 F. 2d 536, 538 (4th Cir. 1972). The Fourth and Fifth Circuits' approach has much to

(Footnote continued from preceding page.)

stitutional grounds for dismissing the teacher. Although *Amicus* correctly perceives that the *Mt. Healthy* facts present what would be an appropriate situation for the award of general damages for the violation of the constitutional right itself, *Amicus* contends that the Court's failure *sua sponte* to suggest such an award of general damages demonstrates the Court's belief that such an award is not warranted. *Amicus* Br. pp. 17-18, n.6. The opinion in *Mt. Healthy,* however, in no way reveals that the Court either had such a conclusion in mind or would have reached such a conclusion had the issue been presented to it. What the facts of *Mt. Healthy* do illustrate, however, is how simple it would be under Petitioners' and *Amicus'* theory for a state official to avoid any accountability for unconstitutional discharges by asserting in court any of the countless constitutionally permissable grounds that can always be found in retrospect to justify a discharge.

recommend it. It can never be determined with complete confidence that a fair prior administrative hearing would have availed the plaintiff nothing and the risk of loss from a procedurally improper erroneous determination should in fairness be borne by the party who created that risk. Such an approach towards allocating the risk of loss from due process violations would also have a drastic deterrent effect upon officials faced with the prospect of extensive consequential damages for every bad faith violation of constitutional rights.

Nevertheless, the Seventh Circuit's approach of awarding the wrongdoing plaintiff only those damages which are found to be inherent in the violation of his rights appears more justified in terms of traditional common law principles of causation and damages. It provides an incentive for citizens to vindicate their constitutional rights and for officials to respect those rights while it avoids the danger of a windfall by measuring the damages according to the harm actually suffered by the deprivation of the right. Regardless, however, of which of the Circuits' approaches is more in accord with the Congressional policy of effective judicial enforcement of civil rights laws and common law remedial principles, both Congressional intent and common law principles would be violated by Petitioners' and *Amicus'* approach of denying the wrongdoing plaintiff all damages for the bad faith deprivation of his constitutional rights.

B. Petitioners' and Amicus' Argument That General Compensatory Damages for the Harm Inherent in the Violation of Constitutional Rights Are Unnecessary for Effective Enforcement of the Civil Rights Laws Because There Are Already Sufficient Incentives to Sue Is Untenable.

Petitioners and *Amicus* maintain that their approach to the problem of awarding damages for constitutional violations would not be adverse to the admitted Congressional policy of effective enforcement of the civil rights laws because there are already enough incentives for plaintiffs to sue without awarding damages

for the deprivation of the rights themselves. Petitioners' Br. pp. 17-18; *Amicus* Br. pp. 37-42. First, they maintain that the potential for an award of attorney's fees under 42 U. S. C. Section 1988 (1976) is sufficient incentive for the plaintiff to sue for the violation of his civil rights. Petitioners' Br. p. 17; *Amicus* Br. pp. 39-40. The possibility of collecting fees for plaintiff's attorney may remove one of the disincentives to suit. However, there is no logical basis for concluding that a plaintiff who has little prospect for monetary recovery for himself because of Petitioners' proposed rule on damages would sue in order for his attorney to recover fees. Indeed, for some plaintiffs the attorney's fees provision may be a positive disincentive to sue because of the possibility of having to pay a prevailing defendant's attorney's fees.

Second, Petitioners and *Amicus* assert that the possibility of collecting punitive damages is sufficient incentive for suits to vindicate civil rights. Petitioners' Br. pp. 16-17, *Amicus* Br. p. 39. However, in *Wood* v. *Strickland*, 420 U. S. 308 (1975), the Court specifically rejected the requirement that plaintiffs prove actual malice by defendants in order to recover damages. Such a standard "would deny much of the promise of Section 1983," and would constitute "an unwarranted burden in light of the value which civil rights have in our legal system." 420 U. S. at 322. The possibility of punitive damages is thus clearly not in itself an incentive to sue sufficient to satisfy the past and present Congressional intent that the Court encourage private civil rights enforcement.

Only brief comment is required for the remaining arguments of Petitioner and *Amicus* that existing remedies for the violations of constitutional rights are adequate in the absence of general damages for the violations themselves. First, Petitioners' belief that the availability of nominal damages "to recognize the invasion of the right" supports his argument against the need for general damages for that invasion, Petitioners' Br. p. 18, is pure fancy. Except in very limited situations, no rational plain-

tiff will sue to recover nominal damages. As courts and commentators have recognized, an award of nominal damages alone is tantamount to a ruling for defendant, except where it is intended to prevent a claim for adverse possession. McCormick, *Handbook on the Law of Damages*, 95-96 (1935), *Kulm* v. *Coast-to-Coast Stores Central Organization*, 248 Ore. 436, 443, 432 P. 2d 1006, 1009 (1967).

Second, *Amicus* argues that the award of compensatory damages for out-of-pocket, emotional and dignatory losses arising out of violations of civil rights under § 1983 provides an adequate incentive to sue. *Amicus'* Br. pp. 38-39. The point is well-taken but inconsistent with *Amicus'* major premise that general compensatory damages should be denied for the violation of the right itself; for, in cases where special or consequential injuries resulting from the violation cannot be proved with reasonable certainty, the crucial incentive of compensatory damages would be meaningless. Only by recognizing that some degree of actual harm is inherent in the bad faith violation of constitutional rights can compensatory damages become an effective incentive to sue for the vindication of such rights under all circumstances, rather than solely when consequential injuries happen to be subject to reasonably certain proof.

Finally, in an attempt to reopen the basic issue decided in *Wood* v. *Strickland* and *Monroe* v. *Pape*, *Amicus* maintains that the following non-damage remedies render an award of damages for the harm inherent in the violation of constitutional rights unnecessary for the protection of those rights: injunctive and declaratory relief, criminal prosecution under 18 U. S. C. Section 242 (1948), the concern of school administrators for their reputations and the concern of school board members with the "probability that a pattern of constitutional violations will adversely affect the likelihood of their reelection or re-appointment to office." *Amicus* Br. pp. 39-41. All of these factors clearly have a role in deterring future violations of students' constitutional rights. However, the legislative history

of the 1871 Act and the Court's interpretation of that history in *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961), leave no doubt that the existence of other possible prophylactic remedies for constitutional violations was not intended to substitute for the availability of the private damage remedy in an action at law. Only damages can provide not only the student, but any citizen, with compensation and meaningful vindication when there has been a bad faith violation of his constitutional rights.

C. The Availability of General Compensatory Damages for the Harm Inherent in the Violation of Constitutional Rights Limits the Need for Ongoing Federal Judicial Intervention in State Governmental Functions.

Not only tradition supports the role of money damages as the "normal and preferred remedy in our courts" and not only tradition justifies restricting injunctive relief to situations where there is no adequate remedy at law. McCormick, *Handbook on the Law of Damages* 1 (1935). The reluctance of the judiciary to mandate the future course of conduct to be followed by citizens and by other branches of government arises out of a prudential concern for the courts' limited powers of mandatory enforcement, for the drastic nature of the one such power they do have, contempt of court, and for their dependence in a democracy on the continued willingness of the citizenry to support the one branch of government that is not formally accountable for its decisions to the will of the majority. Developments *In the Law-Injunctions*, 78 Harv. L. Rev. 994, 1004-1007 (1965); *United States* v. *Richardson*, 418 U. S. 166, 179, 188-191 (1974). This reluctance is even greater where reasons of comity caution the federal court against intruding into the operations of state government. *Rizzo* v. *Goode*, 423 U. S. 362, 380 (1976).

A judgment for damages is the only remedy for the violation of constitutional rights which presents a realistic alternative to what the Court has increasingly considered to be an undesirable on-going intrusive presence of federal courts in the lives of

citizens and in the affairs of state government. *Rizzo* v. *Goode*, 423 U. S. 362, 380 (1976); *O'Shea* v. *Littleton*, 414 U. S. 488, 500-502 (1974); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 600-601 (1975). Naturally, there are constitutional, statutory and common law violations which demand affirmative relief and for which an award of damages alone would be a weak and unacceptable substitute. *e.g. Milliken* v. *Bradley*, ____ U. S. ____, 97 S. Ct. 2749 (1977). For many types of constitutional, statutory and common law violations, however, the choice between the two remedies requires that their relative merits be weighed in terms of both their effectiveness in achieving the goals of the law and their implications for the proper role of the judicial branch of government. Cf. *Allee* v. *Medrano*, 416 U. S. 802 (1974) (majority and dissenting opinions); *Decker* v. *North Idaho College*, 552 F. 2d 872, 875 (9th Cir. 1977); *Burton* v. *Cascade School Dist. Union High School, No. 5*, 512 F. 2d 850, 853 (4th Cir.), *cert. denied* 423 U. S. 839 (1975); *McKee* v. *Breier*, 417 F. Supp. 189, 191 (E. D. Wis. 1976); *Long* v. *District of Columbia*, 152 U. S. App. D. C. 187, 192, 469 F. 2d 927, 932 (D. C. Cir. 1972), *Boomer* v. *Atlantic Cement Co.*, 26 N. Y. 2d 219, 309 N. Y. S. 2d 312, 257 N. E. 2d 870 (1970). Acceptance of Petitioners' contention that compensatory damages are not an available remedy for the harm inherent in the violation of constitutional rights will inevitably result in courts' placing more reliance on broad injunctive decrees as the only remedy available for effectuating the policy of the civil rights laws.

In situations where there is a pattern of constitutional rights violations by agents of government, but the pattern is not of the magnitude required under *Rizzo* v. *Goode* for an injunction against the permissiveness of the supervisory authorities, the unavailability of a damage remedy for the individual constitutional violations themselves will force trial courts to stand passively by until the pattern of constitutional violations does satisfy the *Rizzo* standard for sweeping injunctive relief. Indeed, one federal district court faced with a situation in which a pattern of bad faith

police violations of constitutional rights had been proved, but injunctive relief was unavailable under *Rizzo*, tried *sua sponte* to award general compensatory damages for the proven individual constitutional violations, even though damages had not been requested or theretofore been an issue in the case. *Lewis* v. *Hyland*, 554 F. 2d 93, 101 (3rd Cir. 1977).

Injunctive relief is not the only form of on-going federal court intervention in state affairs which can be avoided or lessened by the availability of an effective damage remedy for the violation of constitutional rights themselves. From *Wolf* v. *Colorado*, 338 U. S. 25 (1949) to *Mapp* v. *Ohio*, 367 U. S. 643 (1961), to Chief Justice Burger's dissenting opinion in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 415 (1970), it is clear that the question of the constitutional necessity of the exclusionary rule revolves around the availability of an alternative effective sanction against the unlawful gathering of evidence by law enforcement officers. While it cannot be predicted whether a clear promulgation by the Court of the permissability of awarding damages under Section 1983 for the harm inherent in the violation of constitutional rights would in the near future justify abandoning the exclusionary rule, such a recognition by the Court would in itself reduce the need for the use of the rule by putting police officials on notice that their negligent or knowing violations of constitutional rights are in themselves sufficient grounds for an award of damages.

Since the time of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *Wolf* v. *Colorado*, 338 U. S. 25 (1949), the Court has found the need for progressively expanding federal court intervention in the conduct of state governmental affairs in order to protect the constitutional rights of citizens. *Baker* v. *Carr*, 369 U. S. 186 (1962); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). This intervention, however, has never been enthusiastic. The Court has recognized that under our federal democratic system of government the direction of local governmental affairs should be left to as great an extent as possible to the elected rep-

resentatives of the majority. *United States* v. *Richardson*, 418 U. S. 166, 179, 188-191 (1974). Where the legitimate need for local governmental autonomy collides with the need to protect constitutional rights the just requirements of both can best be reconciled by the award of damages for the violation of the constitutional right itself. The state remains free to direct the conduct of its own affairs, the individual is compensated to the extent of the deprivation of his right and respect for the Constitution by citizen and official is maintained.

D. Nominal Damages Are an Inadequate Remedy for the Violation of Constitutional Rights Because They Provide Neither Redress for the Harm Inherent in the Deprivation of the Right Nor Deterrence Against Such Violations in the Future.

In recognition of both the probability that the District Court erred in dismissing Respondents' complaints without any relief whatever and that an award of one cent in damages is equivalent to a verdict in their favor, *supra* pp. 39-40, Petitioners argue that nominal damages are an appropriate remedy for the violation of Respondents' constitutional rights. Petitioners' Br. p. 16. Since nominal damages may be awarded only where the violation of the right causes no actual loss to the plaintiff, the adequacy of this remedy depends upon acceptance of Petitioners' contention that the bad faith violation of due process of law in the absence of proof of consequential injury is a deprivation of a mere technical entitlement having no substantive value of its own. This argument, however, as noted above, pp. 25-31, requires the Court to ignore the precise personal harms which procedural due process of law is intended to prevent. Moreover, acceptance of the Petitioner's and *Amicus*' assertion that the Bill of Rights' only ascertainable value is to be found in the consequential interests collaterally protected by the Rights, and not in the exercise of the Rights themselves, would represent a significant change in the role which courts have given to the Constitution as the paramount safeguard for the exercise of the fundamental

rights of American citizenship. It was to avoid the diminution of this role that Judge Tone warned in the Seventh Circuit's opinion below against damages so small as to trivialize the constitutional rights.[10] 545 F. 2d at 32. Since an award of damages for the violation of a right is inevitably the trier of fact's pronouncement of the worth of that right to the plaintiff, there is perhaps no more effective way to trivialize a constitutional right than to award one cent in damages for its violation.

Petitioners and *Amicus* also argue that any award of more than nominal damages for the violation of a constitutional right without proof of consequential injury would constitute a windfall profit for the plaintiff. The identity which Petitioners and *Amicus* see between windfall profits and general damages, however, disappears once it is conceded that a plaintiff loses something of value when he is deprived of the exercise of a constitutional right. The critical distinction obscured by Petitioners' windfall profits argument is that between nominal damages and small damages, which may not be much larger than nominal, but are still compensatory in nature. *Michael* v. *Curtis*, 60 Conn. 363, 22 A. 949 (1891); *Chapin* v. *Babcock*, 67 Conn. 255, 34 A. 1039 (1896).

For example, the injury suffered by a student whose due process rights are knowingly violated by virtue of a suspension

10. The same point was made in the above-cited passage from the decision of the Court of Appeals for the District of Columbia in *Tatum* v. *Morton*, *supra*, p. 20. In his concurring opinion in that case Judge Wilkey was even more explicit on the question:

> "Looking at the wrong done as a collective wrong, the total amount awarded against the defendant District of Columbia should be sufficiently sizeable to discourage repetition of such illegal police action in the future, without being of such horrendous size as to shock the public-taxpaying-conscience. The total amount should be sufficient, when divided among the twenty-seven plaintiffs, to give each an amount which will assure him that First Amendment rights are not lightly to be disregarded and that they can be truly vindicated in the courts." Slip Opinion, p. 4 of concurring opinion.

without a hearing would not necessarily be of the same magnitude as the injury inflicted by virtue of the violation of the due process rights of an accused criminal who is sentenced to prison without a trial. The arbitrariness of the defendant's conduct, the personal indignity inherent in the violation, the importance of the liberty or property interest jeopardized by the due process violation and the relative chance of avoiding the loss had the requisite opportunity for a hearing been afforded are all elements of the injury inherent in the deprivation of due process, *supra* pp. 25-31, which the trier of fact might consider in deciding to award smaller compensatory damages to the suspended student and larger compensatory damages to the prisoner sentenced without a trial.

Distinguishing between small deprivations warranting small damages and major deprivations warranting heavy damages is a task juries have traditionally been relied upon to accomplish, backed-up by the trial and appellate courts' supervisory authority to eliminate the effects of passion and prejudice and to assure that the law is followed. Cf. 1 F. Harper and F. James. *The Law of Torts*, § 5.29, 467 (1956); *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95 (1931); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 394-395 (1974) (White J. dissenting). Petitioners' and *Amicus'* windfall profits argument is especially weak on the record of the instant case in which there has thus far been no award of damages pursuant to the Seventh Circuit's opinion. Therefore, no factual basis exists for dismissing the credibility of the court's instructions to the trial court against awarding damages so large as to constitute a windfall.

Petitioners' and *Amicus'* second argument in favor of nominal damages posits that any larger award for constitutional violations will lessen peoples' willingness to accept employment by the government. Petitioner's Br. p. 18, *Amicus* Br. p. 47. No evidence is advanced to support this proposition which on its face seems unlikely. *Developments In The Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1223 (1977). For example,

the officials faced with liability in the instant case are Chicago public school principals. Even if Illinois law did not require their indemnification by the Chicago Board of Education, Ill. Rev. Stats. Ch. 122, § 34-18.1 (1976), it would be difficult to believe that these school principals would have been deterred from accepting their jobs, which pay over $30,000 a year, *School Budget*, 1976-77, Board of Education, City of Chicago, 1071, 1321, by the possibility of general compensatory damage verdicts against them for their potential bad faith violations of students' constitutional rights. A more important consideration, however, is that the person who would be deterred from accepting government employment because of the fear of being held legally accountable in damages for his bad faith violations of citizens' constitutional rights is not one whom courts should as a matter of judicial policy encourage to take public employment through the incentive of enhanced immunity from damages. Cf. *Developments In the Law—Section 1983 and Federalism*, 90 Harv., L. Rev. 1133, 1224-1225 (1977). Indeed, to limit to nominal damages public official liability for bad faith constitutional violations in order not to discourage people from becoming public officials would contradict Congress' primary purpose in enacting § 1983, which was to deter the use of official authority to violate constitutional rights, *supra* pp. 10-12.

Amicus, however, maintains that deterrence of illegal conduct is not a legitimate purpose of the remedy of general compensatory damages: "(public) school officials should not be subject to liability for damages which are punitive in effect without proof of actual malice." *Amicus* Br. p. 35 n. 12. To the contrary, the Court has long held that punishment for violations of law is a proper function of private damage actions in order to deter future violations. *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33, 42 (1916) ("Liability to a private suit is or may be as potent a deterrent as liability to public prosecution."); *S. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388, 407-8 (1971) (Harlan, J. concurring). In light of the

above discussed legislative intent of § 1983, *supra* pp. 8-15, there can be no doubt that punishing civil rights violators in order to deter violations in the future is an integral function of damage awards under § 1983.

The Court in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), and *Wood* v. *Strickland*, 420 U. S. 308 (1975), addressed at length the balance which should exist between the uninhibited performance of state governmental functions and the deterrence of and compensation for violations of constitutional rights. Instead of accepting the accommodation of those interests which the Court reached in *Wood* through limiting liability in damages to cases where officials knew or should have known they were violating constitutional rights, Petitioners would have the Court now exclude entirely from the scope of judicial redress violations of constitutional rights in cases where harm other than that inherent in the violation is not proven. The particular nature of the harm caused by a bad faith violation of constitutional rights, however, does not justify abandoning the good faith immunity standard of *Wood* in favor of the absolute immunity desired in this case by Petitioners. Moreover, *Amicus'* and *Petitioners' pro forma* warning of the disastrous consequences of allowing compensatory damages for the harms inherent in school officials' bad faith violations of constitutional rights, *Amicus* Br. p. 47, Petitioners' Br. p. 18, is even weaker than the argument rejected in *Wood* against allowing any compensatory damages for school officials' civil rights violations. *Amicus'* and Petitioners' failure to cite, and Respondents' failure to find after searching the case law, even one reported decision since *Wood* awarding students compensatory damages for school officials' bad faith constitutional violations reveals the lack of substance in their contention that boards of education will be crippled by constant oversized damage awards. Furthermore, such argument manifests a deep distrust not only of the common sense and intelligence of judges and juries, but also of the willingness of school officials to conform their conduct to the clear requirements of the Constitution. If

Petitioners' and *Amicus'* doubts about school officials in this regard are justified, however, there is even more reason to allow damages for the harm inherent in bad faith violations of constitutional rights in order to supply the extra incentive needed to insure good faith compliance with the Constitution.

It is not Respondents' position that should public officials no longer be deterred by the threat of compensatory damages for bad faith constitutional violations which are unlikely to result in provable consequential injuries, most of them would proceed to violate constitutional rights without regard for the high esteem in which our society holds the Constitution. Rather, it is asserted that removing the possibility for meaningful judicial redress for the injury inherent in the violation of constitutional rights will permanently alter and diminish the role of the judicial branch of government in safeguarding constitutional rights. Neither in recent nor more remote times does American history give any indication that the legislative and administrative branches of government are in themselves adequate to guarantee the enforcement of constitutional rights. *E.g.*, *United States* v. *United States District Court*, 407 U. S. 297, 316-317 (1972); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2 (1866). It is true that under certain narrow circumstances courts may declare what the Constitution states and may enjoin its future violation. However, unless courts have the ability to award damages for past bad faith violations of the Constitution, victims can have no redress, violators cannot be deterred and the "promise of § 1983" can only be a hollow one.

VI. The District Court's Denial of Damages Because of Respondents' Failure to Quantify Their Damages Was Based Upon an Erroneous Legal Standard and Was Therefore Properly Reversed by the Holding of the Seventh Circuit.

Should the Court find that neither the legislative intent under § 1983 nor common law damage principles justify an

award of general compensatory damages for the harm inherent in the deprivation of constitutional rights, the District Court's denial of damages was still properly reversed because it applied an erroneous legal standard. In assuming that a prerequisite for awarding Respondents damages was "evidence in the record to quantify their damages," Memo. Opinion, A10, the District Court applied a measure of damages that is appropriate for cases where the claimed loss is money or is directly measurable in monetary terms, such as the value of goods or services. The requirement of affirmative evidence to quantify damages is the normal rule for breach of contract cases, which, as the District Court's reliance on two such cases reveals, *Hoefferle Truck Sales Inc.* v. *Divco-Wayne Corp.*, 523 F. 2d 543 (7th Cir. 1975), and *Classic Bowl, Inc.* v. *AMF Pinspotters, Inc.*, 403 F. 2d 463 (7th Cir. 1968), provided the basis for its ruling below. Memo. Opinion, A10.

However, treatise writers,[11] the Restatement of Torts[12] and

11. "A fairly large number of torts, statutory and common law, are concerned principally with invasions of intangible interests rather than with invasions of physical or economic interests. . . . In this class of cases, damages are 'presumed,' or the wrong is said to be damage in and of itself. This includes such claims as those for assault, battery, false imprisonment, malicious prosecution, intentional infliction of mental distress, some kinds of invasion of privacy, alienation of affections and the like, intentional interference with voting and other electoral rights, and for invasion of analogous civil rights provided by statute." Dobbs, *Handbook on The Law of Remedies.* 528-529 (1973) (footnotes omitted); "In addition to proving the fact of loss, the plaintiff must ordinarily prove, so far as it is susceptible of proof, the extent, that is, the equivalent in money, of his loss or injury. This is applicable, of course, to cases of loss or damage to goods or land and to injuries to interests of substance generally, but is as obviously inapplicable to nonpecuniary damage, such as pain, humiliation, or mental suffering." McCormick, *Handbook on the Law of Damages,* 54-55 (1935) (footnotes omitted).

12. "For harms to body, feelings and reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of the amount other than evidence of the nature of the harm. . . . The discretion of the judge

(Footnote continued on next page.)

judicial opinions[13] are in accord that where the claimed injuries are non-pecuniary in nature, and concern intangible harms, such as those to feelings, reputation, personal dignity, privacy or liberty, the injuries are compensable without proof of the extent of the harm "since the existence of the harm may be assumed and its extent is inferred as a matter of common knowledge from the existence of the injury as described." Restatement of Torts, § 904, comment a at 542 (1939). Without a rule of general damages in such cases compensation for the harm suffered would be impossible, as the Iowa Supreme Court pointed out in a false imprisonment case:

> "In the very nature of things, it is not possible for the injured party to open up his mental and emotional experiences in such manner that the jury may examine them as they would examine a map or chart, or may compute and measure his compensation as they would compute the sum due on a promissory note; but, the facts and circumstances of the alleged wrong being given, the jury must be per-

(Footnote continued from preceding page.)

or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation." Restatement of Torts, § 912, comment b at 575-576 (1939).

13. *Page* v. *Mitchell,* 13 Mich. 63, 68 (1864) (in action for false imprisonment court reversed award for nominal damages: "The court can never confine a jury to either nominal or special damages, if there has been a real personal injury; and every deprivation of liberty is so regarded. It is for the jury themselves to determine whether the circumstances should reduce the recovery to a minimum.") *Oliver* v. *Kessler,* 95 S. W. 2d 1226, 1229 (Ct. App. St. Louis, Mo. 1936) ("General damages follow as a matter of course from the mere showing of his wrongful arrest and imprisonment.") *Morrison* v. *Lawrence,* 181 Mass. 127, 130 (1902) (Where a child is excluded from school without a prior hearing, the finder of fact ". . . may consider any indignity or disgrace which follows from the public exclusion of a boy from school."); see also *Manger* v. *Kree Institute of Electrolysis,* 233 F. 2d 5, 9 (2nd Cir. 1956); *Fairfield* v. *American Photocopy Equipment Co.,* 138 Cal. App. 2d 82, 291 P. 2d 194 (1955); *Ross* v. *Leggett,* 61 Mich. 445, 28 N. W. 695, 699 (1886); *Lake Erie & Western R. R. Co.* v. *Christison,* 39 Ill. App. 495 (1891).

mitted to take them, and therefrom to fix the compensation which they, as fair-minded men, may believe to be just and reasonable." *Young* v. *Gormley*, 120 Ia. 372, 94 N. W. 922, 924 (1903).

That civil rights violations commonly result in harms of an intangible non-pecuniary nature is clear from numerous court opinions[14] and is accepted by both Petitioners, Petitioners' Br. p. 16, and *Amicus*, who states that in the context of the denial of student's constitutional right to due process "(a)ctual injury could encompass such elements as emotional and mental distress, humiliation and loss of reputation, as well as out-of-pocket and consequential pecuniary losses." *Amicus* Br. p. 24, n. 9. Given this intangible, nonpecuniary nature of the harms resulting from constitutional violations in general and due process violations in particular, the district court erred in applying a standard for the measurement of damages that does not allow general damages to be presumed from the circumstances of the violation and in requiring instead that Respondents adduce quantifiable evidence of the extent of their injuries.

Although technically the District Court's finding of no damages may be classified as a finding of fact, it is not subject to the "clearly erroneous" standard of review of Rule 52a of the Federal Rules of Civil Procedure since the finding was based on an improper legal standard and is reversible for that reason alone. *U. S.* v. *Singer Mfg. Co.*, 374 U. S. 174, 193 (1963); *U. S.* v. *Parke, Davis & Co.*, 362 U. S. 29, 43-44 (1960); *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011, 1042 (5th Cir. 1969).

14. *Seaton* v. *Sky Realty Company, Inc.*, 491 F. 2d 634, 637-8 (7th Cir. 1974) (In affirming a $500 compensatory damage award for racial discrimination in sale of housing in violation of 42 U. S. C. § 1982 and § 3604 the court stated, after having reviewed the case law: "We are satisfied that under decided federal cases among the circuits, compensatory damages may be awarded for the humiliation suffered by plaintiffs, whether inferred from the circumstances or established by testimony, and that $500 is well within, the range of reasonable amounts."); *Donovan* v. *Reinbold*, 433 F. 2d 738, 743 (9th Cir. 1970).

CONCLUSION.

For the reasons set forth above, Respondents Piphus and Brisco respectfully request that the decision of the Seventh Circuit Court of Appeals be affirmed.

Respectfully submitted,

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Dated: August 31, 1977.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

PUSH, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants,

JARIUS PIPHUS, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants.

Nos. 73 C 2522 and 74 C 303 Consolidated.

MEMORANDUM OPINION AND ORDER

These consolidated cases are civil rights actions challenging the constitutionality of rules and procedures used by the Board of Education of the City of Chicago (the Board) in suspending elementary and high school students from its schools. The cases have been submitted to the Court for final adjudication on stipulated records which include certain depositions, documents, factual stipulations, and affidavits. This opinion will constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Plaintiffs in No. 73 C 2522 are Silas Brisco, a student; his mother, Catherine Brisco, and People United to Save Humanity

(PUSH), a not-for-profit Illinois corporation primarily composed of minority group members.[1] Plaintiffs in No. 74 C 303 are Jarius Piphus, a student; and his mother, Geneva Piphus. Defendants in each action are members of the Board or agents of the Board who allegedly participated in the suspensions in question or who knew or reasonably should have known that unconstitutional suspensions would occur.

During the 1972-73 school year, Silas Brisco was enrolled in the fifth grade at Clara Barton Elementary School which is located on the southside of the City of Chicago. During this period the Barton School was in transition from a predominantly white to a predominantly black enrollment. Also during the 1972-73 school year, several black male students began to attend school wearing earrings. The principal and other school administrators believed that these earrings denoted gang membership and thus a decision was made that in the interest of student safety male students would be prohibited from wearing earrings. The district superintendent with jurisdiction over the Barton School, Steven Brown, was notified of this decision and approved of the prohibition.

Subsequent to the establishment of the earring rule, certain male students were orally informed of the existence of the earring rule and were warned that further wearing of an earring could result in a suspension. There were no other published rules in effect at the Barton School at the time the earring prohibition was adopted nor was the earring rule reduced to written form. Silas Brisco, however, had actual notice of the earring ban.

1. Defendants have challenged the standing of PUSH to be a party plaintiff in 73 C 2522. In a memorandum opinion dated June 13, 1974, this Court held that PUSH alleged facts entitling it to standing. Since then PUSH has filed an uncontroverted evidentiary affidavit which factually supports the allegations contained in the second amended complaint. PUSH therefore has established as a factual matter that it or its members have experienced specific injury in fact and come within the zone of interests to be protected. Its standing to sue has therefore been established. *Warth* v. *Seldin*, 95 S. Ct. 2197 (1975).

Starting in May 1973, Silas Brisco began to wear an earring to school in contravention of the rule. On one occasion in May 1973, he was told to remove the earring or face suspension. At that time he refused and was suspended for a portion of the school day until his mother conferred with District Superintendent Brown; Brisco then removed the earring and was readmitted.

When school reconvened in the fall of 1973, the earring problem reoccurred. On September 11, 1973, Brisco again wore an earring to school. During the course of the day he was called to the school office by the principal, Rudolph Jezek, and Gordon Sharp, assistant principal. They ordered Silas to remove the earring in question. Silas refused, asserting that wearing earrings did not denote gang membership, but rather was a symbol of black pride.

Following his refusal to remove the earring, Principal Jezek conferred with District Superintendent Brown, Brown informed Jezek that the earring ban was still in effect. Brisco was then informed that unless he immediately complied with the rule, he would be suspended. He continued to refuse to remove the earring.

Assistant Principal Sharp then left the immediate central office area to telephone Brisco's mother and write up a suspension report form. Mrs. Brisco then came to Barton School where a conference was held with Jezek and Sharp. Jezek informed Mrs. Brisco of the impending suspension if Silas did not comply with the earring rule. Mrs. Brisco supported her son's behavior and thus a 20-day suspension was imposed. Ultimately, Brisco served 17 days of the suspension; he was voluntarily readmitted while a motion for preliminary injunction was pending before this Court. In sum, at no time before or after Silas' suspension did an independent observer hear evidence with respect to the factual issue of what the wearing of an earring actually denoted.

The facts surrounding the suspension of Jarius Piphus are equally straightforward. During the 1973-74 school year he was

a student at Chicago Vocational High School (CVS). The rules of CVS prevented cigarette smoking and bringing intoxicating substances onto school property. Jarius had actual notice of these rules. On January 13, 1974 defendant Reginald Brown, principal of CVS, observed plaintiff and another student passing an irregularly shaped cigarette between them. At that time Piphus was on school property, near the school parking lot. As Brown approached Piphus, he smelled smoke which he believed to be the odor of marijuana. Mr. Brown also observed Piphus attempting to pass cigarette papers to the other student. Cigarette papers can be used for preparing marijuana cigarettes. When the boys saw Mr. Brown they discarded the cigarette. The object may have been thrown into nearby hedges or discarded on the way to the school office. No attempt was made to recover the object although Piphus has consistently denied that he was smoking marijuana.

Despite the denial, Mr. Brown accompanied Piphus and the other student to the school's disciplinary office and there told the assistant principal to follow the "usual procedure" imposing a 20-day suspension for violation of the rule against smoking marijuana. Piphus was then formally suspended by the assistant principal, although Principal Brown admits that it was his decision to suspend him.

Subsequently, two meetings were held between school officials, Piphus, his mother, sister, and legal representatives from the Mandel Legal Aid Clinic. These meetings were not fact finding hearings but rather were for the purpose of explaining actions previously taken. At the second of these meetings, the Mandel representatives were excluded when they attempted to tape-record the proceedings. Thereafter, Piphus' suspension was reduced to five days by the District Superintendent. At the same time, Judge Bauer entered a temporary restraining order readmitting plaintiff. As a result of the incident in question, Piphus missed eight days of classes.

Two legal issues have been raised by the above-described suspensions: (1) whether students were given sufficient prior notice of conduct which was prohibited, and (2) whether adequate hearings were held at the time Brisco and Piphus were suspended.

At the time of the incidents in question the Board rule governing suspensions read as follows:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Each such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil." Rule 6-9 of the Rules of the Board of Education of the City of Chicago (1973).

Plaintiff's argue that the language "gross disobedience or misconduct" is unconstitutionally broad and vague, particular in an arguably First Amendment context such as the Brisco case. Were the "gross disobedience or misconduct" language the sole notice given to forewarn a student of forbidden conduct, the Court would agree with plaintiffs. See *Soglin* v. *Kauffman*, 418 F. 2d 163 (7th Cir. 1969); *Linwood* v. *City of Peoria*, 463 F. 2d 763 (7th Cir. 1972). However, both students here were given actual notice of reasonably narrow regulations which gave specific meaning to the terms in dispute. *Linwood* demonstrates that this type of procedure is constitutionally sufficient. In *Linwood* the court stated the language "gross disobedience or misconduct"—

> "does not purport to define or proscribe specific acts or omissions which may be penalized by suspension or expulsion. But it does furnish the local school authority with a general guideline or standard—that student disobedience or misconduct must be 'gross' to justify its being made a ground for suspension or expulsion." 463 F. 2d at 768.

Thus, the gross disobedience language was not intended to be a self-executing regulation of student conduct but rather was intended to be a generalized grant of power exercised by instituting more specific regulations. Here such specific regulations were promulgated by the individual schools involved, providing adequate actual notice of forbidden conduct.[2]

Plaintiffs also argue that Brisco and Piphus were not accorded sufficient hearings to test the evidentiary basis for their suspensions. In *Goss* v. *Lopez*, 95 S. Ct. 729 (1975), the Supreme Court held that students who were temporarily suspended from publicly supported schools were entitled to hearings which comport with minimal requirements of due process (an informal hearing).[3] Unless the student's presence poses a continuing

2. Plaintiffs properly note that the Board has failed to issue one generalized set of specific narrowing regulations, nor has the Board required each school to issue appropriate regulations. As a consequence, some schools have no such formal regulations while other schools promulgate regulations on an *ad hoc* or word-of-mouth basis, while yet other schools have a quite formal set of written regulations. Despite this range of behavior, the Court has not been presented with any evidence of specific suspensions of students from schools without any narrowing regulations. Because educational discipline presents problems not easily resolved by constitutional judicial inquiry, until such a case is presented in a complete factual context, this Court expresses no view as to what type of remedy would be appropriate in such a case.

3. After *Goss* was decided the Board revised its suspension practices. Rule 6-9 now reads:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding . . . ten school days for each offense. Every such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil.
>
> "Prior to a suspension of 10 days or less the student shall be given oral or written notice of the charges against him and an informal hearing with an explanation of the basis of the charge and an opportunity to explain his version of the facts. Students whose presence poses a continuing danger to persons

(Footnote continued on next page.)

danger to persons or property or an ongoing threat of disrupting the academic process, the hearing should be held before a suspension is imposed. The Court also stated that suspensions in excess of 10 days, expulsions, or unusual circumstances may warrant more formal hearings. Here both suspensions potentially

(Footnote continued from preceding page.)

> or propery or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and informal hearing should follow as soon as practicable."

The following guidelines were also adopted:

> "1. No student shall be suspended from school without using the authorized procedures. Every suspension shall be reported immediately to the District Superintendent using the appropriate forms and also reported to the parent or guardian of the pupil with a full statement of the reasons for the suspension.
>
> "2. A student facing suspension of ten days or less shall be given oral or written notice of the charges against him and an informal hearing arranged by the principal. At the hearing, the student will be given an explanation of the basis of the charges as well as an opportunity to present his version of the facts.
>
> "3. A student facing suspension may request that a third party—such as a parent, school staff member or another student be present during the informal hearing.
>
> "4. In those cases where a student's presence poses a continuous danger to persons or property or is an ongoing threat of disrupting the academic process, the student may be immediately removed from school. In such cases the necessary notice and informal hearing should follow as soon as practicable.
>
> "5. Every effort should be made to ensure the student's receipt of class assignments for the period of the suspension. The academic grade of a suspended student will not be affected when class assignments are completed satisfactorily in keeping with standards applicable to all students set by the students' teacher. Teachers have the further option of testing pupils upon their return to class on the work submitted."

For the reasons stated in footnote 2, the Court believes that the constitutionality of these new regulations cannot be tested until a full factual background is developed. Moreover, the parties have failed to demonstrate that a true case or controversy presently exists with respect to these rules. This Court therefore should not render an essentially advisory opinion on the constitutionality of the rules.

exceeded 10 days, triggering the need for more formal procedures. Additionally, the first amendment implication of the Brisco case also warrants stricter procedural standards before a suspension can be imposed. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969).

This Court's prior opinion in *Quintanialla* v. *Carey*, 75 C 829 (N. D. Ill. March 31, 1975) sets out the basic contours of a formal school disciplinary hearing:

> (1) the student should be given a prehearing notice of the specific charges against him, including a short summary of the evidence the school administrator intends to rely upon;
>
> (2) the student should have the right to be represented by counsel (or another responsible advocate) at the hearing;
>
> (3) the student should be able to present witnesses on his behalf and cross-examine witnesses;
>
> (4) the student, at his expense, should be able to make a tape recording or transcript of the hearing;
>
> (5) an impartial hearing officer should preside generally. This would preclude a witness from serving as the hearing officer and, in some instances, a school administrator not from the same school as the accused student would be necesary.

See also *Mills* v. *Board of Education of Dist. of Columbia*, 348 F. Supp. 866, 880-84 (D. D. C. 1972); *Vail* v. *Board of Education of Portsmouth School Dist.*, 354 F. Supp. 592, 603-604 (D. N. H. 1973).

Measured against these generalized requirements it is apparent that both Brisco and Piphus failed to receive adequate disciplinary hearings. The decisions to suspend both of them were made by their major factual accusers. Neither was afforded an opportunity to present evidence in his behalf at a meaningful

time and in a meaningful manner. Any conferences with respect to the suspensions in question were held after an administrative decision had already been made. Piphus' attorneys were excluded from his post-suspension conference and he was not permitted to make a tape recording of the conference.

Since plaintiffs have established that unconstitutional suspensions occurred, we must consider the form of relief to be provided. Undoubtedly plaintiffs are entitled to a declaration that the suspensions in question were unconstitutional. Plaintiffs' school records should be corrected, deleting any reference to these suspensions. Plaintiffs have also asked for an award of actual and punitive money damages. A recent Supreme Court and several recent Seventh Circuit opinions set forth the standard for measuring whether monetary liability is appropriate. *Wood* v. *Strickland*, 95 S. Ct. 992 (1975); *Minns* v. *Board of Education*, No. 74-1534 (7th Cir. Sept. 24, 1975); *Hostrop* v. *Board of Junior College Dist. No. 515*, No. 74-1915 (7th Cir. Sept. 24, 1975). An official is immune by reason of good faith for liability for damages for a constitutional violation if he is:

> "acting, not with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff], but 'sincerely and with a belief that he is doing right.' Second, if he meets the first test, he is liable only 'if he knew or reasonably should have known' that his act 'would violate the constitutional rights of the plaintiff' " *Hostrop, supra*, Slip Op. p. 10, quoting *Wood, supra*, 95 S. Ct. at 1001.

Here the record is barren of evidence suggesting that any of the defendants acted maliciously in enforcing disciplinary policies against the plaintiffs. Undoubtedly defendants believed that they were protecting the integrity of the educational process. With respect to the second element of the *Wood* test, it is appatent that shorter suspensions as contemplated by *Goss* might raise the defense that defendants are not "charged with predicting the future course of constitutional law" and thus cannot be

held responsible for the legal developments anticipated in *Goss*. The initial length of suspensions imposed in the instant case seems to indicate, however, that under the *Linwood* rationale, defendants should have known that plaintiffs were entitled to some type of adjudicative hearing. The potential 20-day length of the suspensions was more analogous to an expulsion than a *Goss*-type suspension. Defendants should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs. Technically, therefore, plaintiffs should be entitled to damages.

However, damages must be proved with at least a reasonable degree of certainty. *Hoefferle Truck Sales Inc.* v. *Divco-Wayne Corp.*, 74-1481 (7th Cir. Oct. 6, 1975); *Classic Bowl, Inc.* v. *AMF Pinspotters, Inc.*, 403 F. 2d 463 (7th Cir. 1968). Plaintiffs put no evidence in the record to quantify their damages, and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof. Accordingly, the complaints are dismissed.

IT IS SO ORDERED.

ENTERED:

/s/ R. W. MCLAREN,
United States District Judge.

Dated: November 5, 1975.

FOR ARGUMENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

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TABLE OF CONTENTS.

Table of Authorities.

Cases.

Other Authorities.

IN THE

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Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

ARGUMENT.

I.

RESPONDENTS HAVE FAILED TO ESTABLISH THAT LEGISLATIVE INTENT REQUIRES AN AWARD OF GENERAL COMPENSATORY DAMAGES WHEN INDIVIDUALIZED INJURY IS ABSENT.

In arguing that the legislators always intended that 42 U. S. C. § 1983 was to be a vehicle for the award of money to a wronged plaintiff, even absent individualized injury, respond-

ents employ the subtle rhetorical device of shift in meaning. Our language, and most assuredly our legal language, possesses words having more than one meaning or usage. Thus, *remedy* may be the right to seek redress, or it may also be actual relief of the redress, *i.e.*, an injunction or a monetary award. Courts and attorneys often use *injury* synonymously with *damage*. Most meanings are clear within the context of the writing but taken therefrom, may be used to import a different meaning. Finally, *damage* does not import the same meaning as *fact of damage;* the former being general and speculative; the latter being considered upon the evidentiary proofs.

The issue before this Court is the holding of the Seventh Circuit Court of Appeals that a plaintiff is entitled to receive at least a general compensatory award merely upon the showing of the violation of civil rights. In seeking to support this holding, the respondents quote the original bill's proponents: Representatives Sheldon, Frelinghuysen, Shellabarger, Hawley and Smith; and opponents Representatives McHenry, Kerry, Arthur and Thurman. To summarize, at pp. 9-14 of Respondent's Brief:

> The proponents:
>
> Sheldon: ". . . a permanent law affording to every citizen a remedy. . . "
>
> Frelinghuysen: ". . . the injured party should have an original cause of action. . ."
>
> Shellabarger: ". . . carefully confined to giving a civil action for such wrongs. . ."
>
> Smith: ". . . make the perpetrator liable to a civil action for damages . . ."
>
> Hawley: ". . . protect me. . . "
>
> The opponents:
>
> McHenry: " . . [the civil remedy is] a punishment or penalty. . ."
>
> Kerr: ". . . [gives] a civil action for damages. . ."
>
> Thurman: ". . . transferring all mere private suits . . . from the State into the Federal courts."

Respondents' quotes of Representatives Hawley and Arthur are simply the advocacy of, respectively, a proponent and an opponent.

It seems clear that all representatives agreed that the proposed enactment was to be no more than a remedy, a cause of action, not otherwise existing at common law. The salutory effects anticipated by the proponents, the disgraceful abuses expected by the opponents, neither added to nor detracted from the limited creation of a remedy alone. Certainly no congressman ever advocated that an individual be awarded money when he suffered no individualized injury or pecuniary loss.

The meaning which respondents' wish to give to "remedy" is actual monetary relief; injury has become "damages"; and further intended to mean an entitlement to an award, on the basis that "damage" satisfies the "fact of damage" requirement.

However, the congressional debaters discussed a cause of action only. This cause of action, whether intended to be remedial or deterent, can be no more than a right to seek redress for a wrong. Nothing in the congressional debates suggests that the courts of this land were directed to ignore that final and necessary element of a successful cause of action, the fact of damage.

Indeed, petitioners conclusion that 42 U. S. C. § 1983 was intended by its drafters to be a cause of action only, is the same conclusion reached by the Harvard Law Review, in *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. R. 1133, 1155 (Apr., 1977):

> Although the proposed Ku Klux Klan Act was the subject of a heated debate, section 1—which is today codified as 42 U. S. C. § 1983—was the least controversial portion of the bill. . . Section 1 caused the least concern, as it only added civil remedies to the criminal penalties established by the 1866 Civil Rights Act.

II.

THE NATURE AND NECESSITY OF THE FACT OF DAMAGE.

A. The Right to Receive an Award Requires the Proof of the Fact of Damage.

The entitlement to an award for the invasion of any right can only come after the plaintiff has met his burden of establishing his legal injury, the fact of damage, whereupon a jury could conscientiously speculate as to the amount. As this Court stated in *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 562 (1930), when defendant below asserted as error, that the damages awarded by the trier of fact was based upon pure speculation and conjecture:

> . . . It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. *Taylor* v. *Bradley*, 4 Abb. App. Dec. 363, 366, 367, 100 Am Dec. 415:
>
> "It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.
>
> "The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not

> the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount."

Put another way, the plaintiff must clearly establish an evidentiary basis for the fact of his damage; then, and only then, may the trier of fact place a monetary value upon it. This is exactly the view which the Second Circuit applied in *Simon* v. *New Haven Board & Carton Co.*, 516 F. 2d 303, 306 (1975) when it held that uncertainty as to the amount of damages upon which the trier of fact may speculate, "does not extent to uncertainty as to the *fact* of damages" (Emphasis in original), which the plaintiff must prove.

Once evidence of fact of damage has been established, the trier may then seek to place a dollar value on the damages due. Petitioners accept, within this limitation, respondents' assertions, Respondents' Brief, p. 46, that deliberations may include such things as the defendant's conduct, the extent of plaintiff's proven indiginty[1], and other factors established by the evidence. The uncertainty of the value of these factors are thrust upon the erring defendant, but the risk of proving the legal injury, the fact of damage, never shifts from the plaintiff to the defendant. Whatever the plaintiff's difficulties may be in this respect, it is not the burden of the defendant, or the court or of the jury. As Justice Frankfurter explained in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 267-268 (1945) (dissenting from the holding):

> The distinction is between proving that some damages were "the certain result of the wrong" and uncertainty as to the dollars and cents value of such injuring wrong. Such difficulty in ascertaining the exact amount of damage is a risk properly cast upon the wrong-doing defendant. But proof

1. Considering the illusiveness of the due process concept, petitioners suggest that these two school boys were hardly aware of a "due process evidentiary hearing" requirement. Query: If the boys were indignant at all, would they still be if Judge McLaren ruled that their hearings were adequate. Probably yes; but the indignity would be from having been caught and suspended for violating school regulations, as it always was—in the beginning, after the trial, perhaps even now.

> of the legal injury, which is the basis of his suit, is plaintiff's burden. He does not establish it merely by proving that there was a wrong to the public nor by showing that if he had been injured ascertainment of the exact amount of damages would have had an inevitable speculative element to be left for a jury's conscientious guess.
>
> * * * * *
>
> Where there is conceded legal injury, as for instance where one man's chattel is taken by another, as in the old case of *Armory* v. *Delamirie*, 1 Strange, 505, 93 Eng Reprint 664, we start with the legal injury and the problem is merely one of ascertaining damages "uncertain in respect to their amount." Such cases are not helpful where the crucial issue, as here, is whether there is solid proof of the existence of a legal injury.

The absence of this most important element of plaintiff's case is well demonstrated in *Hoefferle Truck Sales* v. *Divco-Wayne*, 523 F. 2d 543 (7th Cir., 1975). (This case was cited among Judge McLaren's authorities, but respondents ask this Court to disregard it, Respondents Brief, p. 50, because it was only a "normal rule for breach of contract cases.") Because of the multiplicity of parties, the trial in the district court was bifurcated. Defendants were found guilty in the liability trial. However, before the damage trial, both Clarence and Dolly Hoefferle died, thus precluding any testimony on the fact of Hoefferle Truck Sales damages. Not without sympathy for this plaintiff, Judge Bauer affirmed the trial court's denial of damages because of the "speculative inference" of the extent of the Hoefferle injury.

This sound rule of law had been followed in the Seventh Circuit until *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (1975). In a case which had been brought to this Court, on other grounds, the trial judge, Chief Judge Steckler denied damages in *Jacobs* v. *Board of School Commrs. of City of Indianapolis*, 349 F. Supp. 605, 612 (Ind., 1972) *aff'd* on other grounds, 490 F. 2d 601 (1973), *rev'd* on other grounds, 420 U. S. 128 (1975):

> In addition, with respect to plaintiffs' request for compensatory damages, the court finds that plaintiffs have not established sufficient data from which the court can properly estimate the extent of damages, if any. Such damages sought to be received must be shown with reasonable certainty as to their nature and extent, and may not be based upon mere speculation or conjecture. (Citations omitted.)

Plaintiffs Jacobs, *et al.*, just did not have any damages, and never raised the issue in either the Circuit Court of Appeals or in this Court.

B. The Fact of Damage Is Not Inherent in Respondents' Deprivation of an Adequate Due Process Hearing.

Respondents assert that harm is inherent in the deprivation of a due process right. The difficulty with their claim is that (a) harm is generalized injury, not fact of damage; and (b) it acknowledges that the plaintiffs below had suffered neither tangible nor intangible damage which would entitle them to an award had they met their burden of proof.

Inherent harm, the respondents claim, is four-fold (p. 27, Respondents' Brief). Petitioners believe that in Respondents' discussion, Respondents' Brief, pp. 27-31, of the nature and extent of the inherent harm which they find in the failure to provide an adequate due process hearing, is reasoned to be, ultimately, the failure to provide an adequate due process hearing.

None of the numerous examples given by respondents support the inherent damage theory of the Seventh Circuit. Humiliation, distress and outrage (Respondent's Brief, p. 29) stigma and indignity suffered (Respondent's Brief, p. 31) are actual and subjective injuries considered under general compensatory damages. A value may be placed on personal property taken or time lost because of a revocation of probation (Respondents' Brief, p. 30), which the trier of fact may weigh. The loss of

educational opportunities (Respondents' Brief, p. 30) is surely not inherent—to some children, this might be of great importance, to others, none: what is the inherent harm to a boy who is otherwise a chronic truant; what is the value to the bright student who suffered no diminishment in grades or learning? Respondents are asserting these examples of pecuniary loss or individualized injury, none of which were suffered by the plaintiffs below.

Counsel for respondents now challenge for the first time in this case, certain elements of the Statement of Facts. Because of the prejudicial atmosphere which is sought to be created by this unsupported challenge, petitioners feel obliged to respond to these statements.

Petitioners submit that the Statement of Facts is identical in substance to that submitted by them to the Seventh Circuit Court of Appeals, and to which plaintiffs below offered no objection. The only changes are slight condensing and eliminating of references to the record, all upon the reasonable assumption that the original accurate record, never challenged, would not be attacked at the eleventh hour.

Respondent Brisco now attempts to dispute petitioners' Statement of Facts, never previously disputed by him, by introducing a "distractor" of First Amendment rights of free expression. This issue was never reached by the trial court, and the only support for the claim was Brisco's answer, in his deposition, that his reason for wearing the gang earring was "blackness."[2] Regardless

2. At pp. 11-12, Silas Brisco testified:

Q. Mr. Jezik told you to remove the earring, did he not?
A. (By Mr. Brisco) Yes.
Q. Mr. Jezik also stated to you that he believed it was a symbol of gang membership, did he not?
A. Yes.
Q. What, if anything, did you say to him when he said that?
A. Well, I didn't say nothing.
Q. Did he ask you to remove the earring?
A. Not at that time.
Q. What, if anything else, did he say?

(Footnote continued on next page.)

of Mr. Brisco's subjective reason, the earring was known to be a gang symbol, gangs were actively recruiting members at Brisco's school, and the violence associated with this recruitmen constituted a threat to the safety and well-being of the children. School authorities would have been open to the charge of being remiss in their duties had they not banned these gang symbols. This ban, and the reason for it, was always known to Mr. Brisco.

Likewise, the emphasis upon the use of marijuana by Mr. Piphus works as a distractor because it ignores the fact that merely by smoking any substance, tobacco or marijuana, Mr. Piphus was in violation of the school rules.[3] It is undisputed that the school principal personally believed the substance to be

(Footnote continued from preceding page.)

A. He just started explaining that he, that there would be trouble if I wear the earring in school, and stuff, and people might come up after me and stuff.
Q. What, if anything, did you say at that time?
A. I say, "The earring dont' mean nothing."
Q. It really doesn't mean nothing?
A. Nothing but blackness.

3. Deposition of Reginald Brown, Principal of Chicago Vocational High School, p. 10.

Q. What is prohibited?
A. (By Mr. Brown). Smoking of cigarettes or marijuana. There is no smoking period, of anything.
Q. So that there is a rule against smoking?
A. Yes, yes, plus there's a city ordinance against smoking in public buildings.
Q. Are there any written—
A. Yes.
Q. —smoking rules?
A. There's—there's a rule that prohibits it.
Q. Is it a written rule of the schoool?
A. Yes.
Q. What exactly is the content of the rule?
A. That it is prohibited.
Q. All types of smoking?
A. Yes.
Q. Both tobacco—
A. Smoking period.
Q. —and marijuana?
A. Smoking period.

marijuana, and Mr. Piphus denied only that the substance was marijuana, and he has even from the filing of his complaint, always admitted his culpability.

Respondents also attempt to make an issue of the fact that no appeal had been taken by the petitioners. Inasmuch as the major thrust of the lawsuits below was the claim of unconstitutionality of certain Board of Education Rules involving suspensions, and those Rules had been changed to conform to this Court's holding in *Goss* v. *Lopez*, 419 U. S. 565 (1974), the issue was moot. (See the opinion of Judge McLaren, and footnotes thereto, at pp. A10-A11 of Pet. for Writ.)

The fact of damage cannot be said to evolve inevitably in the areas claimed by respondents. Upon proof of tangible physical injury, the trier of fact may infer pain and suffering, for common experience has shown that one inevitably follows the other. Indignity, humiliation, stigma, all also require an evidentiary basis. If the evidentiary basis is present, a trier of the fact may weigh the amount of damages; absent that basis, the trier of the fact cannot even consider an award.

Furthermore, the concept of "inherent damages" deprives the defense counsel of the truth seeking process of cross-examination. In private injury litigation, liability may be obvious, but the claim of injury a sham. If the defense counsel believes this, he has his opportunity to cross-examine the plaintiff to establish the theory, or even clarify the limits of any intangible injury claimed. In the same cases, the defense might also rebute with expert witnesses. None of this is possible if a trier of the fact *must* award damages solely because liability has been established.

The fundamental fallacy of the theory that damages are inherent in the nature of the violation can be readily noted from a portion of Mr. Justice Frankfurter's dissenting opinion in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 267 (1945):

> . . . [A]ction by the government to enforce anti-trust acts merely requires proof of illegality, [and] an individual's right of recovery is dependent on proof of legal injury to him, . . .

It is the state, and only the state which has a right to have redress for that wrong. When the law is broken, the state need not prove any individualized injury. Such form of wrong is to the state as the representative of the people, and it is committed by the mere breach. The private citizen, upon his own cause of action, does not stand in the shoes of the state. His remedy is to redress the special injury to him. And, he cannot prevail in civil litigation upon merely the claim of inherent wrong.

Inescapably, one reaches the conclusion that only the fact of damage entitles a prevailing plaintiff to some compensatory monetary award. "Inherent damages", not only falls short of establishing that fact, but also exists only in the abstract, a concept upon which a trier of fact could not even speculate. As Circuit Judge Wright observed in *Dellums* v. *Powell* (D. C. Cir., Case No. 75-1974, August 4, 1977.), "The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights".

III.

COMMON LAW TRADITION FAILS TO SUPPORT AN AWARD OF GENERAL COMPENSATORY DAMAGES TO A PLAINTIFF WHO HAS ONLY ESTABLISHED A BREACH OF A RIGHT.

A. Respondents' "Voting Rights Cases" Do Not Support a Presumption of Damages Inherent in the Nature of the Violation of the Right.

Neither English nor American precedent can support the respondents' unequivocable conclusion that certain voting rights cases require an award of damages solely for the invasion of the civil right. The major cases of respondents' brief (Respondents' Brief, pp. 18-24), are best considered in historical sequence.

Ashby v. *White*, 2 Ld. Raym. 938 (1703) is most complex. As a "voting rights" case, it appears to be the first of its genre.

The House of Lords reinstated a trial verdict for the plaintiff, upon the reasoned dissent of Lord Chief Justice Holt (2 Ld. Raym., pp. 950-958) from the reversal of the trial judgment by his brothers. The plaintiff had brought his action for the denial by the registrar of the right to cast a vote for a parliamentary representative. There was serious doubt as to whether or not the claim was actionable, and the court held that it was not. Lord Holt dissented and stated, at 950:

> *The single question in this case is,* whether, if a free burgess of a corporation, who had an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by the officer, *if an action on the case will lie against such officer.* (Emphasis added.)

Lord Holt conducted a two-fold inquiry: first did the right exist; second, was its denial actionable at law. He found in the affirmative on both issues. However, at no time did he ever consider the measure of damages. The usual remedy of the common law being that of damages, the Chief Justice addressed that point only on the right, on the grounds therein, to seek that remedy. In fact, it is probable that, judging by his comparison to other common law trespasses, and the nature of the defendants' wrong, he intended either nominal or punitive damages (2 Ld. Raym., at p. 955): "[B]ut surely every injury imports a damage, though it does not cost the party one farthing and it is impossible to prove to the contrary"; and, "If publick officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences (sic)." In *Drewe* v. *Coulton* (1787) (cited in full in *Harman* v. *Tappenden,* 1 East 560, 563 [1801]), *Ashby* v. *White* was reversed: the negligent denial of voting rights would not give rise to an action at law, although an action might still lie if actual malice were to be proved. This reversal was noted in *Lincoln* v. *Hapgood* also cited by respondents as authority, and discussed next, below.

Lincoln v. *Hapgood,* 11 Mass. 350 (1814), is a strange case, for it seems to be an action brought upon the claim of a

right of a freeman to vote in as many jurisdictions as he desires, without regard to residency requirements. A jury had awarded some unspecified damages. On appeal, the court affirmed. Plaintiff's injury was compared to harm his reputation, and the denial of his vote was tantamount to his exclusion from the ranks of the citizenry. Defendants, on the other hand, followed the law and neither negligently, wilfully nor maliciously deprived the plaintiff of his vote. Upon the whole, "leave cases of this kind to the jury."[4]

The 1919 voting case of *Wayne* v. *Venable,* 260 F. 64 (8th Cir., 1919), cited by Respondents Brief, p. 24, and by *Amicus* Brief, pp. 31-32, finds its support in *Scott* v. *Donald,* 165 U. S. 58 (1897) and *Wiley* v. *Sinkler,* 179 U. S. 58 (1900). No such reliance supports the respondents' "inherent damages" theory, as will be noted in the foregoing discussion of those cases. However, to the extent that the *Wayne* court did discuss damages, it is apparent that it directed the reference to intangible, general damages, rather than some form of "inherent damages". For, as the court states, at p. 66, such damages would be awardable "[W]ithout evidence of actual loss of money, property, or any other valuable thing, . . ." At best, the court alludes only to the possibility of some intangible yet real injury arising from the breach of a duty owed to the plaintiff by the defendant.

In *Scott* v. *Donald,* 165 U. S. 58 (1897), plaintiffs sought to recover special compensatory and punitive damages for the unlawful taking of chattels (wine and liquor) by local constables. Although the plaintiffs and the defendants alluded to the constitution for protection of their respective rights, the action was clearly pleaded as one of trespass. The lower court award —$300, the small value of the chattels, plus punitive damages, was affirmed.

Respondents' reliance on *Wiley* v. *Sinkler,* 179 U. S. 58 (1900) surely must be misplaced. The quote, from which re-

4. Today even under this Court's rigid good faith standard of *Wood* v. *Strickland,* 403 U. S. 308 (1975), defendants Hapgood and others probably would have not been held to damages.

spondents' draw only a portion of a sentence, p. 24, footnote 5 misinterprets the opinion. The court's entire point was a jurisdictional issue, and the full quote, 179 U. S. at 65:

> The damages are laid at the sum of $2,500. What amount of damages the plaintiff may recover in such an action is peculiarly appropriate for the determination of the jury, and no opinion of this court upon that subject can justify it in holding that the *amount in controversy was insufficient to support the jurisdiction of the circuit court.* (Emphasis added.)

The court conducted no inquiry into the nature or type or amount of damages to which a successful litigant might be entitled following a trial on the merits.

That "Mr. Justice Holmes recognized in *Giles* v. *Harris*, 189 U. S. 475 (1903), that damages are a uniquely appropriate remedy for the violation of certain political rights, such as the right to vote" (Respondents' Brief, p. 19), not only represents a misinterpretation of this Court's opinion but also distorts the entire direction and basis of the case. The plaintiff below had brought a bill in equity, complainting that he and his class had been refused registration to vote, and praying that the Court direct them to be placed upon the rolls. The case was not a private cause of action seeking damages. Mr. Justice Holmes addressed this issue only in two senses. In the first instance, he was satisfied that the jurisdictional amount, as required by statute, could be met by the mere assertion of the claim (but held that the issue had not been preserved for review) in the second sense, he distinguished between an actionable private cause of action and a non-actionable political question. He affirmed the lower court's dismissal based upon lack of jurisdiction.

In *Nixon* v. *Herndon*, 273 U. S. 536 (1927), this Court refused to recognize the defense of "political question" and affirmed the right of a citizen to bring a private cause of action upon a claim of denal of voting rights. At no time did this court consider either the nature or the measure of damages to which a prevailing plaintiff might be entitled.

Through the medium of the opinions of Mr. Justice Frankfurter, respondents unite the holdings of this Court in *Coleman* v. *Miller*, 307 U. S. 433 (1938), and *Colgrove* v. *Green*, 328 U. S. 549 (1946). In each instance, the comparison to a private cause of action was raised only to demonstrate that the cause of action brought below was both political and non-justiciable. Whether actionable or not, neither Mr. Justice Frankfurter nor any other member of this Court deciding these cases ever held that plaintiffs were entitled to receive damages inherent in the nature of the wrong.

Generally speaking, most American courts which have considered damage claims for deprivation of voting rights seem to follow the later English case of *Drewe* v. *Coulton, supra.* rather than the earlier *Ashby* v. *White, supra. Ashby* seems to be cited for the proposition that a cause of action exists at common law for the deprivation of voting rights, but otherwise the basis of liability and the measure of damages, will be governed by the malice standard of *Drewe*.

Lincoln v. *Hapgood, supra,* deferred to the jury for liability, but the majority rule among those states which have considered the claim is that a plaintiff may recover no more than nominal damages unless he demonstrates malice or wilful misconduct, thereby justifying a punitive award. These cases support that majority:

> In *Long* v. *Long*, 57 Iowa 497, 10 N.W. 875, 876 (1881), the court affirmed the validity of a jury instruction, as to the measure of damages, in that "if the defendant acted without malice the plaintiff was only entitled to nominal damages."
>
> *Lane* v. *Mitchell*, 153 Iowa 139, 133 N.W. 381 (1911): more than nominal, *i.e.*, punitive, awardable if wilful and malicious wrong was done.
>
> *Larson* v. *Marsh*, 144 Nebr. 644, 14 N.W. 2d 189, 193 (1944), held that nominal damages are the measure of recovery where the legal wrong has been established but there is no proof of actual damages.

The direction which these early cases sought to give was that a private remedy existed for the deprivation of voting rights. In no sense did the courts propose some form of strict liability of damages, which "inherent damages" indeed is. Finally there is no sign that these judges, trained in the solid tradition of the common law, ever intend that some new and special rule be created to award money, absent the fact of damage.

B. Statutory Violations Do Not Imply Inherent Damages, But Continue to Require Fact of Damage.

Respondents presume that the violation of the statute, the invasion of the right, establishes some strict liability of damages. However, the violation of a statute creates only a remedy—a cause of action, a right to recover. The violation alone is not the equivalent of the fact of damages, the amount of which a trier of the fact may guess. In an early case before this Court, an employee was physically injured, allegedly through his employer's violation of certain federal safety acts. The Court, in affirming for the plaintiff below, held in *Texas & P. R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1915):

> A disregard of the command of statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in Comy's Dig., titled, "Action upon Statute" (f), in these words. "So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to said law."

The remedy provided by statute is the right to seek redress for the wrong. The remedy most assuredly is not automatic relief when a violation of a right has been shown. As this Court held in *Rondeau* v. *Masinee Paper Corp.*, 422 U. S. 49, 64-65 (1975), in rejecting respondent's contention that a violation of

the Williams Act[5] by the petitioner was sufficient to entitle the respondent to relief (here, an injunction):

> The fact that the respondent is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites for injunctive relief.

In *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 267-268 (1945), an anti-trust action, Mr. Justice Frankfurter's dissenting opinion demonstrates that clear distinction between the violation of the law and the necessity of proving individualized injury or pecuniary loss.

> A right of action is also given to any individual who has been "injured in his business" by such illegality. But while action by the Government to enforce the Anti-trust Acts merely requires proof of illegality, an individual's right of recovery is dependent on proof of legal injury to him, and legal injury is not automatically established by proof of a restraint of trade in violation of the Sherman Law.

Several of these cases emanate from securities and anti-trust laws, and the frequency of which violations thereof have been presented to this Court need not be further recited. Yet, one must observe that the same public cry of outrage, the same congressional concern which accompanied the enactment of the Ku Klue Klan Act also accompanied the enactments of the anti-trust and securities acts.

C. General Compensatory Damage Award in the Absence of Individualized Injury Is Without Foundation in the Common Law.

Petitioners accept Respondents' concession, (p. 15, Respondents' Brief) that the common law limits compensatory damages to the measure of damages for the actual injury suffered. Actual

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5. Amendment of Securities Exchange Act of 1934, 15 U. S. C. § 78m(d).

and legal injury is the coincident of the fact of damage, which has always been a necessary element to successful recovery for a wrong. Petitioners' Brief accurately and correctly set forth the common law of damages, and no exception which respondents now argue can dispute that traditional law.

Respondents justify much of their argument in support of their conclusion that damages must be awarded, absent individualized injury, by analogy to cases allowing awards for intangible injuries. This begs the question. The Seventh Circuit's holding did not deal with intangible injury but rather "inherent damages". Whatever the respondents may wish this to be, "inherent damages" is not the intangible injury which supports awards of general compensatory damages. (See, *e.g.*, *Seaton* v. *Sky Realty*, 491 F. 2d 634 [7th Cir., 1974] which discusses at length those types of intangible injuries, the fact of damage, which justify an award of general compensatory damages: subjective pain and suffering, humiliation, embarrassment, discomfort, mental anguish, emotional and mental distress.)

While some courts seem obliged to pronounce that there is damage in the violation of priceless rights, even then awards are nonetheless based upon the individualized injury which the plaintiff may have suffered. This may be readily seen in a case cited by respondents (Respondents' Brief, p. 21), *Manfredonia* v. *Barry*, 401 F. Supp. 762 (E. D. N. Y., 1975). Plaintiffs brought a § 1983 action based upon false arrest affected by certain police officers. The court found the defendants liable, and then proceeded to discuss the issue of damages. At the outset the court observed, at p. 771:

> To assign an appropriate monetary value to the denial of rights so highly prized, however, is not a simple task, if it is not to be purely arbitrary.

Thereafter, the court discussed the effects upon the plaintiffs, as had been adduced from the evidence. They suffered mental and emotional distress. The plaintiffs had been unlawfully fingerprinted, photographed and jailed overnight. They received

undesirable public notoriety and harassment from neighbors, even relatives. Furthermore, they received numerous anonymous letters and telephone calls, conveying threats of harm or insulting and scurrilous remarks. Thereupon, the court held, at p. 772:

> [The defendant police officers] are responsible for the natural and normal consequences of their acts when they failed to act as reasonably prudent men by making these unlawful arrests. Having recklessly deprived these plaintiffs of important constitutional rights—which the defendants should clearly have recognized and protected—and wrongfully subjected them to mental and emotional distress of being charged as criminal offenders and the public humiliation which followed, the defendants must make compensation.

The award of general compensation could only have been made upon the individualized injuries suffered by each plaintiff. To assume otherwise would be to give no meaning to the court's considered discussion of what actually did happen to the plaintiffs as a result of the defendants' unlawful acts, and would render an award "purely arbitrary".

Numerous other cases cited by respondents (Respondents' Brief pp. 20-24) conform to the traditional rules of damage. Plaintiffs received special compensatory damage awards upon proof thereof; if intangible but nonetheless real injury were to be present—humiliation, distress, pain and suffering, or the like—the plaintiff received general compensatory damages. None of these cases dispensed with the requirement of proof of pecuniary loss or individualized injury.

As Mr. Justice Powell observed in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974): "[A]ll awards must be supported by competent evidence concerning the injury although there need be no evidence which assigns an actual dollar value to the injury." This is the rule which must be applied when the parties reach the damage issue of a lawsuit. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, ... U. S. ....., 97 S. Ct. 690 (1977),

this Court unanimously refused to allow the respondents a new trial, upon the reversal of the district court's award of approximately 7 million dollars in treble damages in an anti-trust case:

> . . . Since respondents did not prove any cognizable damages and have not offered any justification for allowing them, . . . [petitioner is] entitled to judgment on the damage claim. . . .

Respondents rely on the Seventh Circuit's holding, principally buffered by the earlier case in the same circuit, *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (1975). Both the present case and *Hostrop* found neither tangible nor intangible injury, but held that the fact of an injury was established by the mere violation of the statutory protection of 42 U. S. C. § 1983, and this, by itself established the fact of damage.

Some Courts since *Hostrop* seem to ascribe to the principle of damages inherent in the violation of priceless constitutional rights. But, as before, it is clear that awards are sustained only upon proof of the fact of damage, an individualized injury or a pecuniary loss. In the case cited by Respondents' Brief, pp. 20-21, *Tatum* v. *Morton* (D. C. Cir., Case No. 76-1187, Aug. 10, 1977), (as yet unreported during the preparation of this Brief), the court definitely focused upon the special and general loss of plaintiffs whose authorized public demonstration was prematurely ended, the demonstrators taken into police custody, booked, required to post a $10 collateral each, and otherwise subjected to indignities (including an obnoxious strip search), the court affirmed an award solely because of the plaintiffs' pecuniary losses and individualized injuries. At p. 6 of the courts' slip opinion, it considered first the special compensatory damages:

> At a minimum the monetary importance of this right is indicated by the expenditures they devote to their trip, and the willingness to forego a day of their own time, whether at work or in recreation.

And, next, the general compensatory damages, upon the intangible injuries, at p. 6 of the slip opinion:

> Compensatory damages embrace more than recompense for monetary injury, however as is evident from amounts for pain, suffering and humiliation.

Judge Wilkey's concurring opinion advocated some moderate collective award, lest public reaction to the payment of substantial amounts from public funds cause Congress to ban demonstrations in various areas of the capital.

A week earlier, Judge Wright (who participated in the *Tatum* decision) wrote the majority opinion in *Dellums* v. *Powell* (D. C. Cir., Case No 75-1974,[6] August 4, 1977) (unreported during the preparation of this brief), addressed the issue of "inherent damages." With great succinctness, he cut to the heart of the problem, at pp. 52-54 of the slip opinion:

> That loss of opportunity to demonstrate constitutes loss of First Amendment rights "in their most pristine and classic form" does not mean, however, that monetary recompense should be extravagant. The award should be proportional to the loss involved insofar as it seeks to compensate intangible injuries. The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights. Comparing these principles with the instructions actually given the jury, we find error because *these instructions did not require the jury to focus on the loss actually sustained by the plaintiffs.* (Emphasis added.)

Judge Tamm, dissenting, would have reversed on liability, and therefore did not reach the issue of damage.

A plaintiff who cannot meet his burden of proof as to his legal injury, his fact of damage, can find no solace in the common law. The plaintiff has no right to go to the trier of fact when he has failed in his evidentiary burden of pecuniary loss or individualized injury, and most assuredly he cannot do so upon the theory of "I can't-prove-it-so-please-presume-it."

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6. Note that there are four *Dellums* opinions, not necessarily involving the same parties or the same issues.

D. The Common Law Also Recognizes an Award of Nominal Damages for Civil Rights Violations.

Under the common law, the trier of fact also has available the remedy of nominal damages even in civil rights cases. In *Magnett* v. *Pelletier*, 360 F. Supp. 902 (D. C., Mass., 1973) *rev'd.* in part, 488 F. 2d 33 (1st Cir., 1973) the district court awarded $500 nominal damages for a civil rights violation, which was affirmed by the Circuit Court as to the category of the award, but it then directed that the amount be reduced to $1.[7] In *Cordova* v. *Chonko*, 315 F. Supp. 953 (N. D., Ohio, 1970), the district court refused to enter a compensatory award and instead allowed $0.01 in nominal damages for violation of a student's civil rights. Some members of this Court have also approved the concept of awarding nominal damages for the violation of civil rights, *Codd* v. *Velger*, 429 U. S. 625 (1976), Mr. Justice Brennan, dissenting, at footnote 3, indicating that the trier of fact may consider an award of nominal damages for the denial of a timely due process hearing.

Respondents' argument that an award of a trivial sum (nominal damages), at p. 45, Respondents' Brief, is to trivialize the violation of a constitutional right. This cannot be so. Money is the measure of damage, and as petitioners pointed out, at pp. 14-15, Petitioners' Brief, nominal damages *may* be awarded when a paramount right has been invaded, even though the plaintiff suffered no actual injury. Numerous civil rights cases support this tenet of the common law of damages; and, to consider several:

> *Hammond* v. *Housing Authority*, 328 F. Supp. 586 (Ore., 1971). Plaintiffs proved a violation of their civil rights, but no actual damages. Compensatory damages were denied,

7. The Circuit Court's holding is correctly cited above. Respondents' quotation from this case, at p. 21 of their Brief, is accurate but it is *dicta* by the court. Therefore, respondents' conclusion as to the holding—a remand to consider general compensatory damages —is erroneous since their conclusion relies on that *dicta*.

> and the court allowed $1,000 in attorneys' fees for vindication of the rights.
>
> *Mayberry* v. *Robinson*, 427 F. Supp. 927 (M. D Pa., 1977). The right of the jury to award nominal damages for violation of civil rights was affirmed, but the amount of $100 was reduced to $1, in accordance with the rules of the circuit.
>
> *Hodge* v. *Seiler*, 558 F. 2d 284 (5th Cir., 1977). Relying upon *Wayne* v. *Venable*, 250 F. 64 (8th Cir., 1919) and *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (7th Cir. 1975), the court held, at p. 288. "[I]t was error for the district court to decline to award Mrs. Hodge *at least nominal damages*." (Emphasis added.)[8]

Perhaps respondents are only concerned with the categorization, for they see no fault in awarding "damages, which may not be much larger than nominal, but are still compensatory in nature." (Respondents' Brief, p. 49.)

IV.

COMPELLING PUBLIC POLICY CONSIDERATIONS REQUIRE A DENIAL OF "INHERENT DAMAGE" WHEN THE CIVIL RIGHTS VIOLATION IS MERELY CONSTRUCTIVE RATHER THAN INTENTIONAL.

It is perhaps best to first reexamine the factual envelope surrounding the respective suspensions of Messrs. Piphus and Brisco, especially in light of the respondents' frequent referral to the defendants "bad faith constitutional violations"[9] which

8. There is precedent for holding that while a trial court's failure to award nominal damages can be error, it is "de minimus" and will not be reversed on appeal, *Schaeper* v. *Edwards*, 360 F. 2d 175 (6th Cir., 1962). However, petitioners take no position on a remand solely for that reason.

9. This phrase is, at best, of the "mixed metaphor" category—producing an incongruous assembly of ideas. A plaintiff's claim that his civil rights had been violated may be one matter, quite apart from a defendant who may assert certain affirmative defenses, such as

(Footnote continued on next page.)

first appears at page one of their Brief and continues throughout.

As to Mr. Piphus, he was observed smoking on school premises by his principal, who recognized the substance as marijuana. Piphus denied the substance, but admitted the smoking.[10] The trial court held that Mr. Piphus had actual notice of narrow rules prohibiting his misconduct. Mr. Brisco also violated school rules of which he had prior actual notice. He particularly knew that his school educators, concerned with violence connected with gang recruitment at the school, had banned all gang symbols, which included male earrings. When given the opportunity to remove his gang earring or face suspension, Brisco chose to keep his earring. Upon his own explanation of the events at that time, he merely asserted that the earring symbolized nothing. Upon these flagrant violations of school rules each plaintiff elected to sue all members of the Board of Education; the acting general superintendent of schools, since retired (Mr. Redmond), and various other educators who were involved to a greater or lesser degree in the plaintiffs' suspensions.

Against this background, the trial court found (Opinion, Pet. for Writ, p. A13):

(Footnote continued from preceding page.)
good faith. "Bad faith", therefore, is not an element of the tort —and, it is not even the opposite of a "good faith immunity". The former imports evil or wilful misconduct; whereas, the defendant looses his good faith immunity merely by having failed to have foreseen, under the reasonable man standard of *Wood* v. *Strickland*, 420 U. S. 308 (1975).

10. Deposition of Jarius Piphus, p. 19, August 23, 1974.

Q. Were you smoking that day?
A. (By Mr. Piphus) yes.
Q. Did you have a cigarette in your hand at the time you saw Mr. Brown?
A. No, I didn't.
Q. Had you had a cigarette in your hand just prior to the time you saw Mr. Brown?
A. Yes, I did.
Q. Where did you light that cigarette?
A. When I first came out the door.

> Here the record is barren of evidence suggesting that any of the defendants acted maliciously in enforcing disciplinary policies against the plaintiffs. Undoubtedly the defendants believed that they were protecting the integrity of the educational process.

However, Judge McLaren felt that this was not enough to pass the second part of the "good faith immunity" test required by *Wood* v. *Strickland*, 420 U. S. 308 1975), since the defendants should have foreseen that the "*Linwood* Rationale"[11] required that the defendants provide more than the informal hearings which were given the boys.

With full knowledge of the foregoing, it is incomprehensible that the respondents would label defendants' conduct as being the equivalent of evil and wilful intent. Where, one may ask, is either the actuality, even a parallel, to the petitioners' act as are compared to the respondents' various hypothetical examples:

> Brisco's earring was intentionally seized and destroyed. (Respondents' Brief, p. 32.)
>
> An Orthodox Jew's religious symbols were maliciously destroyed by prison officials. (Respondents' Brief, p. 32.)

11. In *Linwood* v. *Board of Ed. of City of Peoria*, 463 F. 2d 763 (7th Cir., 1972), the court had occasion to review certain school board rules related to evidentiary hearing for students facing expulsion. The rules were found to satisfy constitutional due process requirements. The court also observed, in *dicta*, that those same hearing factors would be required for suspensions in excess of seven days.

Defendants/petitioners had suggested to the trial court, in legal memoranda, that *Betts* v. *Board of Ed. of Chicago of Chicago*, 466 F. 2d 629 (7th Cir., 1972) would be the appropriate guide, in view of the admitted culpability of Messrs. Piphus and Brisco. At 633, the court held:

> As to what process is due, it is important that the plaintiff unequivocally admitted the misconduct with which she was charged. In such a circumstance, the function of procedural protections in insuring a fair and reliable determination of the retrospective factual question whether [the plaintiff clearly violated a school rule] is not essential.

In adopting the *"Linwood Rationale"*, Judge McLaren remained silent on any possible application of *Betts*.

> Police break into a citizen's home, absent cause or reason. (Respondents' Brief, p. 32.)
>
> A sheriff knowingly abuses his authority and imprisons a murder suspect for five years. (Respondents' Brief, pp. 33, 37, 46.)

Unlike respondents' examples, petitioners herein were found guilty only upon the legal construction that they should have known, the typical assignment of constructive knowledge which appears in negligence torts. Constructive breaches in constitutional torts can be no different from constructive breaches in any other tort. Nowhere in tort law is a defendant "punished" by being required to pay money when the plaintiff has failed to show his legal injury, his fact of damage.

Must the schools now become part of a *Through the Looking Glass*[12] syndrome. If so, disobedient children shall now reap monetary awards when they had suffered no legal injury. At the same time, dedicated educators shall be called upon to pay them for judgmental errors, made in exercise of the supervisory discretion which our courts regularly claim belongs in the province of the educators.[13] Is it wise, for example, to allow a child to recover "inherent damages," if he can find the grounds to support his claim that his civil rights were violated when he was directed by his teacher to write fifty times, "I will come to school prepared".[14]

12. Lewis Carroll's 1872 sequel to *Alice in Wonderland*. Alice, in her new adventures, wondered what life was like beyond her mirror. She discovered that everything was backwards.

13. To be sure, upon recitation that public school education is best left to those charged with the duties, the courts regularly substitute its judgment for that of the school. See, *e.g.*, *Goss* v. *Lopez*, 419 U. S. 565, where both the majority and the dissent reach different conclusions upon the same observation.

14. This is not a hypothetical, but is actually a portion of a claim brought against school personnel in *Woods* v. *Hannon*, 77 C 289 (N. D., Ill.), a recently filed lawsuit against Board of Education personnel based upon 14th Amendment due process and equal protection claims, in failing to waive various school incidental fees.

(Footnote continued on next page.)

Presumably, respondents attempt to justify the imposition of damages absent legal injury by asserting that the defendants can afford to pay. After all, they say, principals earn over $30,000 annually, and besides, there is a statutory promise of indemnification (Respondents' Brief, p. 47). And, of course, "the amount of litigation spawned by public school educators . . . when their own jobs are at stake. . ." (Respondents' Brief, p. 26, Fn. 6) somehow estops the petitioners from contesting the issues herein. Each argument addresses no issue before this Court. Almost all of the defendants, in each suit, serve without pay; and what is a $30,000 salary to Rudolph Jezik, Jr., principal of the Barton School (Brisco), whose death was spread of record on February 4, 1974, after he was shot at the school.

What is important in these constructive violations is the effects of these awards upon defendants who act under the sincere belief that they are protecting the educational process. As observed by the Harvard Law Review article on § 1983 law:[15]

> Certainly, there can be little doubt that as a general matter, government officials must inevitably make numerous discretionary decisions, and that the process of doing so may well *not* be enhanced by the frequent presence of the decisionmakers as defendants to 1983 actions. (Emphasis in original.)

Thus, in addition to problems of obtaining qualified public servants in the face of this threat, the danger also exists that those public educators may refrain from necessary discretionary decisions, when faced with the potential of paying damage to someone who suffered no real injury but merely claimed an entitlement to "inherent damages". As Judge Hand observed, in

(Footnote continued from preceding page.)

The specific reference is to plaintiff Marcus Woods' claim that the school required him to wear gym shoes in physical education class, even though he could not afford them and had to write the sentences, above, when he came unprepared for class.

15. *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. R. 1133, 1222 (April, 1977).

an action for false imprisonment, in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (2nd Cir., 1949):

> There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from those errors.

In *Barr* v. *Matteo*, 360 U. S. 564, 571-572 (1959), an action for defamation, this Court considered Judge Hand's earlier opinion, and explained the rationale:

> It has been thought important that officials of government should be free to exercise their duties unencumbered by the fear of damage suits in respect of acts done in the course of those duties—*suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might inhibit the fearless, vigorous, and effective administration of policies of government.* (Emphasis added.)

While both of the above cited cases dealt primarily with the issue of immunities from suit—which this Court still recognizes in civil rights actions, on a qualified basis—the reasoning holds particularly true for awards of "inherent damages." Because the educator invariably acts under color of state law, must he research for each and every discretionary act, to find whether he should somehow know that his decision might require him to pay monetary damages to some person thereby affected, even though no legal injury had been suffered, if a court should later hold that the decision violated that person's civil rights?

Thus, the very punishment which respondents wish to be imposed upon defendants, absent any real or genuine injury to the plaintiff, has already been addressed, and found undesirable. While it may be said that being compelled to pay damages to a wronged plaintiff will act as a deterrent, nonetheless, the purpose and entire existence of those damages is compensation.[16]

16. *Dellums* v. *Powell* (D. C. Cir. Case No. 75-1974, Aug. 4, 1977), p. 9 of Specially concurring opinion of Circuit Judge Leventhal:

(Footnote continued on next page.)

As Mr. Justice Powell pointed out in *Bangor Punta Operations, Inc.* v. *Bangor and Aroostock R. Co.*, 417 U. S. 703, 717 (1974):

> The Court of Appeals further stated that it was important to insure that petitioners would not be immune from liability for their wrongful conduct and noted that BAR's recovery would provide a needed deterrent to mismanagement of railroads. Our difficulty with this argument is that it proves too much. If deterrence was the only objective, then in logic any plaintiff willing to file a complaint would suffice. No injury or violation of legal duty to the particular plaintiff would have to be alleged. The only prerequisite would be that the plaintiff agree to accept the recovery, lest the supposed wrongdoer be allowed to escape a reckoning. Suffice to say that we have been referred to no authority which would support so novel a result, and we decline to adopt it.[14]

14. As Dean Pound stated in reply to a similar argument in *Home Fire:*

> If a wrongdoer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrongdoing, that is the basis of recovery. . . . 67 Neb., at 673, 93 N. W., at 1035. (Portions of footnote omitted.)

Punitive damages, and only punitive damages, are the means by which a defendant's wilful misconduct is to be punished, to deter him and others from like conduct.

Two district court judges, sitting as the trier of fact found that neither plaintiff in the present case had quantified their damages or submitted evidence by which the trier of fact could

(Footnote continued from preceding page.)

> . . . Every action for damages has some potential for deterrence, but in the absence of special circumstances calling for exemplary damages, the amount of the award should be based on compensation, not punishment or deterrence.

even speculatively infere the extent of the injuries, and therefore plaintiffs' claims for damages were denied. The 7th Circuit Court of Appeals clearly erred in substituting its judgment for the trier of the fact.

CONCLUSION.

For the reasons set forth above, petitioners Carey, et al. respectfully request this Court to reverse the decision of the Seventh Circuit Court of Appeals and affirm the finding of the District Court.

Respectfully submitted,

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No. 76-1149

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN D. CAREY, et al.,

Petitioners,

vs.

JARIUS PIPHUS, A Minor, and GENEVA PIPHUS, Guardian Ad Litem for JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, et al.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A Minor, and CATHERINE BRISCO, Guardian Ad Litem for SILAS BRISCO,

Respondents.

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

OTHER AUTHORITIES

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Amicus Curiae, National School Boards Association, is a nonprofit federation of this nation's state public school

boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of local lay control, with educational policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its thirty-seventh year, National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly lay elected or appointed community representatives, responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions.

National School Boards Association submits this brief with the conviction that the decision of the United States Court of Appeals for the Seventh Circuit should be reversed because it erroneously holds that local school board members should be liable for general compensatory damages when students are suspended from school without a constitutionally adequate due process hearing, even when the school officials acted without actual malice and the students suffered no actual injury. Amicus further believes that the decision of the Court of Appeals should be reversed because it improperly interferes with the ability of the nation's school boards to govern effectively the schools entrusted to their care by the local communities to whom they are responsible. The concept of local lay control of the nation's public schools, a concept rooted

in considerations of comity, federalism and sound educational policy, requires that the decision of the Court of Appeals be reversed.

The parties have, pursuant to Supreme Court Rule 42.2, consented to the filing of this brief.

ISSUE PRESENTED FOR REVIEW

Whether a public school student is entitled to general compensatory damages because he was suspended from school without a constitutionally adequate due process hearing, even though the school officials acted without actual malice and the student fails to establish that he suffered any actual injury.

STATEMENT OF THE CASE

Amicus Curiae relies on the statement of the case set forth in the brief for petitioners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988 of Title 42 of the United States Code:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit held that public school officials are liable for general compensatory damages if they suspend a student from school, without a constitutionally adequate due process hearing, even if the school officials acted without actual malice, and the student fails to prove that he suffered any actual injury. According to the Court of Appeals, a student need not sustain the burden of proving actual injury because the existence of general compensatory damages is presumed from the fact of the constitutional violation itself. If a technical violation is established, damages must be awarded in an amount "neither so small as to trivialize the right nor so large as to constitute a windfall." *Piphus* v. *Carey*, 545 F.2d 30, 32 (7th Cir. 1976) (footnote omitted).

The threat of liability for substantial damages, in a highly speculative amount, will seriously impede the work of the public schools. The recruitment of qualified candidates for school board positions will certainly be encumbered if school board members, who generally serve without remuneration, must contemplate using their personal financial resources to satisfy judgments of this nature during their terms of service. The cost to the public schools from this loss of human resources would be immense. If school districts, on the other hand, undertake to indemnify school board members in these circumstances, as an inducement for them to serve, already scarce public funds would be further diverted from the schools' principal task of providing educational services. In either event, liability for general compensatory damages will cause a serious dislocation of traditional arrangements for managing public education.

The absence of a compelling need for imposing this difficult choice on local communities is underscored by the fact that an award of general compensatory damages,

without proof of actual injury, would necessarily constitute a windfall to the student whose rights have been technically violated, regardless of the amount of the judgment. Moreover, the allowance of general compensatory damages would effectively sanction an award, which must by definition be punitive in nature, without requiring the proof of aggravating circumstances or actual malice which is the normal prerequisite for punitive damages.

Congress has charged the federal courts with the task of fashioning appropriate legal and equitable remedies for the enforcement of the federal civil rights acts. 42 U.S.C. § 1988 (1976). In fashioning appropriate remedies, the courts must be guided by existing federal law, where applicable, and by the common law, as modified by the constitutions and laws of the states. Existing legal principles will not support an award of general compensatory damages for a technical violation of a student's due process rights.

Even in actions to redress racial discrimination and to protect the exercise of First Amendment rights, the federal courts have required that damage awards be principled and measured. When public employees have been discharged for constitutionally impermissible reasons, for instance, the courts have allowed them to recover only the difference in salary between that which they would have earned if they had retained their employment with the government, and that which they reasonably could have earned through suitable alternative employment. In this context, the courts have emphasized the compensatory character of damage awards; they have not allowed an additional award of general compensatory damages based on the unconstitutionality of the discharge itself. At most, the courts have awarded nominal damages in recognition of the technical breach of a legal duty which does not result in actual injury. The allowance of general compensatory damages is inconsistent with the restitutional nature of compensatory damages, and with the background of tort principles against which remedies for Section 1983 violations have traditionally been fashioned in the federal courts. 42 U.S.C. § 1983 (1974).

Moreover, it is clear that vigilant enforcement of the civil rights acts neither requires nor warrants the creation of a general compensatory damage remedy in these circumstances. Adequate means for enforcement of the civil rights acts exist without this added deterrent. In most cases, it may be assumed that some actual injury will result from significant infringements of federal civil rights, and that actual compensatory damages will be proved. Moreover, proof of actual malice or other aggravating circumstances may justify an award of punitive damages. Injunctive and declaratory relief are also available. The federal courts may also encourage the vindication of federal constitutional rights by allowing an award of attorneys' fees to the prevailing party in civil rights litigation. Finally, a wilful deprivation of civil rights may lead to criminal prosecution.

This Court has previously recognized that effective local lay control of the public schools requires that the intervention of the federal courts in school matters should be narrowly tailored to remedy existing constitutional violations, without unduly interfering with the local management of the schools. General compensatory damages are not necessary for the effective vindication of constitutional rights and, because of their inherently speculative nature, they would seriously interfere with the efficient management of the public schools.

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

ARGUMENT

Introduction

This case presents a question of acute importance to the continued viability of local lay control of the nation's public schools: whether local school officials must be held liable for general compensatory damages when the constitutional due process rights of students are violated, without actual malice on the part of school officials and without proof of actual injury to the students affected. In *Wood* v. *Strickland,* 420 U.S. 308 (1975), this Court held that local school officials enjoy a qualified immunity from liability in Section 1983 damage actions. The Court held that a school official may be liable for *compensatory* damages "only if the school board member acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Id.*, 322. The Court did not consider the precise nature of the compensatory damages to be awarded.

In this case, the United States District Court for the Northern District of Illinois held that the plaintiff public school students were denied due process when they were suspended from school without constitutionally adequate hearings. The district court found that the defendant school officials were not improperly motivated, but held that they should have been aware that their procedures did not comply with constitutional requirements.[1] While

[1] Silas Brisco was suspended from school on September 11, 1973. Jarius Piphus was suspended on January 23, 1974. Both suspensions occurred prior to this Court's decision in *Goss* v. *Lopez,* 419 U.S. 565 (1975). The district court held, however, that the defendant school officials should have known that Brisco and Piphus were entitled to some type of adjudicative hearing pursuant to the Seventh Circuit's decision in *Linwood* v. *City of Peoria,* 463 F.2d 763 (7th Cir. 1972), *cert. denied,* 409 U.S. 1027 (1972).

the district court found that defendants were not immune from liability under the principle established in *Wood,* the court held that plaintiffs were not entitled to damages because they had failed to prove that any actual injury resulted from the denial of due process. *App.* 14.[2] The Court of Appeals for the Seventh Circuit reversed the judgment of the district court, holding that plaintiffs were entitled to an award of general compensatory damages, without proof of individualized injury, because the right to general compensatory damages is inherent in the due process violation itself. The Seventh Circuit held that the damage award "should be neither so small as to trivialize the right nor so large as to provide a windfall." *Piphus* v. *Carey,* 545 F.2d 30, 32 (7th Cir. 1976) (footnote omitted).

The principle adopted by the Seventh Circuit authorizes damage awards against public school officials, in a speculative and uncertain amount, for negligent deprivations of federal constitutional rights that do not result in actual injury to students. If approved by this Court, the principle articulated by the Seventh Circuit would seriously affect the continued viability of local lay control of this nation's public schools. As the Court noted in *Wood,* "The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." *Wood* v. *Strickland,* 420 U.S. 308, 320 (1975) (footnote omitted). The persistent threat of open-ended liability, in the nature of general compensatory damages, would further encumber the already difficult task of persuading competent and respon-

[2] References to Appendix A, Petitioners' Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit, are designated herein as "App."

sible citizens to lend their services, usually without remuneration, to the management of public education. Moreover, even if school districts were to indemnify board members, as an encouragement for them to serve, scarce public resources would be diverted from the schools' principal task of educating students.

In *Wood,* the Court recognized that strong considerations of public policy would favor an absolute immunity for public school officials. The Court held, however, that countervailing policy considerations required that the immunity of school officials should be qualified. "[A]bsolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* While the Court held that public school officials are not absolutely immune from liability for compensatory damages, the policy considerations supporting a qualified immunity from liability for actual compensatory damages also require that the principle established in *Wood* should not be extended to sanction liability for general compensatory damages. In the absence of actual injury, the need to provide a remedy for deprivations of students' rights, which informed the Court's decision in *Wood,* loses its force.

I.

The Court Of Appeals Erred In Holding That Plaintiffs Were Entitled To General Compensatory Damages For A Technical Denial Of Their Due Process Rights, Without Proof Of Actual Injury, Because Generally Accepted Legal Principles Preclude An Award Of Damages Or Allow Only Nominal Damages In These Circumstances.

Traditionally, the common law has awarded compensatory damages to an injured party as compensation, indemnity or restitution for actual injury sustained by him. *Restatement of Torts* § 903 (1939). "The law of torts has a reparative effect; it preserves economic stability by providing money substitutes for losses." Morris, *Punitive Damages In Tort Cases,* 44 Harv.L.Rev. 1173 (1931). Compensatory damages are not allowed in the absence of actual injury.[3] The federal courts have followed these prin-

[3] While compensatory damages will not be awarded in the absence of proof of actual injury, compensatory damages are sometimes awarded without proof of the *amount* of actual loss caused by the injury. With respect to certain torts, such as libel and slander per se, the law generally presumes that actual damages naturally result from the mere fact that the tort was committed:

> When general damages are awarded in cases of libel or slander per se, they often represent a reasonable guess, or at least some kind of guess, that actual damages have been sustained, though the amount is not capable of proof. If a man is called a communist, he may not lose his customers or friends, but he may nevertheless lose their confidence in some unprovable way, and this may indeed cost him money in the future even though he could never hope to prove it. Thus one important factor in the award of general damages is some estimate, however rough, of the probable degree of *actual* loss a man will suffer given the particular charge against him, even though that loss cannot be identified in money terms.

D. Dobbs, *Handbook On The Law Of Remedies* § 7.2, pp. 513-4 (1973) (footnote omitted) (emphasis in original).

(footnote continued)

ciples in compensating victims for tortious interference with their federal civil rights. Numerous cases exist in which state officials have violated First Amendment free-

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(footnote continued)
The rationale for general damage awards in cases of libel and slander per se rests on a presumption that these types of defamation generally give rise to actual damages, as a matter of course, but that the precise nature and extent of the damages may be inordinately difficult to prove within the time limits necessarily imposed on trials. It would be impossible, of course, to receive testimony from everyone in the community who might have been influenced by the defamation. For policy reasons, therefore, the law of torts modifies the customary burden of proof in cases of libel and slander per se, so as to allow an award of general damages without proof of the extent of actual loss. The policy reasons underlying this rule are inextricably interwoven with the substantive policies and principles of the law of defamation. Indeed, they are peculiar only to the law of libel and slander per se, inasmuch as general damages are not allowed in cases of slander per quod. "All other slanderous words, no matter how grossly defamatory or insulting they may be, which cannot be fitted into the [four traditional and] arbitrary categories . . ., are actionable only upon proof of 'special' damage—special in the sense that it must be supported by specific proof, as distinct from the damage assumed to follow in the case of libel or the kinds of slander already considered." W. Prosser, *Handbook Of The Law Of Torts* § 112, p. 760 (4th ed. 1971). The law of damages in defamation cases is unique because of policy considerations peculiar to the substantive law of defamation as well as uneven historical development within the law of defamation. Consequently, the damage principles developed in this area are not readily transferable. Neither do they provide any assistance whatsoever in determining whether general compensatory damages should be allowed in federal civil rights cases. In cases of slander per se and libel, the law allows an award of general damages to compensate for actual loss. In cases of technical violations of a student's due process rights, actual loss is not self-evident and, consequently, it would be inappropriate to allow general damages by analogy to the law of defamation.

doms, discriminated on the basis of race, or denied citizens their constitutional right to due process of law. In these cases, the federal courts have allowed compensatory damages upon proof of actual injuries, including mental distress, pain and suffering, and pecuniary losses, resulting from the deprivations.

Federal courts have not allowed compensatory damages, in a substantial amount, for purely speculative harm "inherent" in the constitutional deprivation itself. In those cases where the courts have awarded damages based on an "inherent injury" theory, they have limited recovery to a symbolic award in a nominal or trifling amount. The federal courts have adhered to generally accepted legal principles which preclude the award of substantial damages in the absence of proof of actual injury.

While Congress has charged the federal courts with the task of fashioning appropriate remedies in actions for redress of civil rights violations, the discretion of the courts is narrow. 42 U.S.C. § 1988 (1976). The courts are not licensed to devise novel sanctions in fashioning appropriate remedies for violations of civil rights. The Court of Appeals for the Seventh Circuit erred in directing the district court to award general compensatory damages in the present case.

A. In Fashioning Interstitial Adjustments Of Remedies For Redress Of Civil Rights Violations, The Federal Courts Must Be Guided By Traditional Principles Of The Law Of Remedies.

Section 1983 establishes a private cause of action for persons who have been deprived of their federal constitutional rights by state officials or other persons acting "under color of state law." 42 U.S.C. § 1983 (1974). Section 1983 does not, in terms, authorize any particular type

of damage remedy for deprivations of civil rights under color of state law.[4] "Section 1983 . . . is completely silent as to the kind of damages which may be awarded an injured plaintiff in a civil rights suit." *Basista* v. *Weir*, 340 F.2d 74, 85 (3rd Cir. 1965). Instead, Congress provided only that persons acting to deprive another of his federal civil rights, under color of state law, should "be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1974). As the Third Circuit said in *Basista*, the language of the statute "[o]bviously . . . connotes damages of some kind, but goes no further." *Basista* v. *Weir*, 340 F.2d 74, 85 (3rd Cir. 1965). Logically, the right to proceed in an action at law would seem to entail the right to prove and recover actual compensatory damages. It is well-established that a Section 1983 plaintiff may, within the terms of the statute, recover damages sustained because of official conduct which violated his federal civil rights. *See*, *Monroe* v. *Pape*, 365 U.S. 167 (1961). "The plain words of the statute impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." *Rizzo* v. *Goode*, 423 U.S. 362, 370-71 (1976).

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[4] Section 1983 was originally enacted as Section One of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. Congress enacted this legislation pursuant to its constitutional power to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. Congress could have provided specific remedies for violations of Section 1983. Indeed, if Congress were to determine that an unusual remedy, such as general compensatory damages, should be allowed in Section 1983 cases, Congress could specifically so provide. In the absence of congressional action, the federal courts are bound to follow customary principles of damages. 42 U.S.C. § 1988 (1976).

While Congress did not designate specific remedies, in Section 1983, for the vindication of federal civil rights, Congress did provide a general framework for judicial fashioning of remedies in civil rights cases. In Section 1988, Congress provided that the federal courts should be guided by the laws of the United States, to the extent that they are applicable, and by the common law of remedies, as modified by the constitutions and laws of the states, in providing appropriate relief for violations of federal civil rights. 42 U.S.C. § 1988 (1976). This Court had occasion to construe Section 1988 in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969). The Court said:

> This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.

Id., 240.

The Court's construction of Section 1988 is consistent with the general power of the federal courts to supply interstitial remedial details when Congress has omitted to do so. The incorporation of state statutes of limitation provides a useful analogy: "The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg* v. *Ambrecht*, 327 U.S. 392, 395 (1946). By enacting Section 1988, Congress effectively delegated to the federal courts the task of fashioning appropriate remedies, within the framework of familiar legal principles, for violations of the federal civil

rights acts. *Moor* v. *County of Alameda*, 411 U.S. 693, 698-707 (1973).

As the Court noted in *Sullivan*, the formulation of appropriate remedies for the enforcement of the federal civil rights acts must be informed by a proper understanding of the precise need for specific types of relief. "The rule of damages . . . is a federal rule responsive to the need." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969). Moreover, the Court must be guided both by familiar principles within the law of remedies and by constitutional principles of comity and federalism, as well as by the legislative purposes of the federal civil rights acts. Remedies must be carefully measured in that they must assist in the vindication of constitutional rights without needlessly disrupting the administrative processes of the states. Obviously, even the most effective deterrent may not be adopted if it places an unnecessary or disproportionate burden on legitimate state activities. *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

B. The Federal Courts Have Not Traditionally Allowed An Award Of General Compensatory Damages For A Bare Violation Of Constitutional Rights, Without Proof Of Actual Injury, Even In Areas Subject To Special Scrutiny Such As First Amendment Activity And Racial Discrimination In Public Employment.

In the present case, the Court of Appeals held that the district court erred in failing to award general compensatory damages to Piphus and Brisco. The Court of Appeals reasoned that the school officials' failure to afford adequate due process procedures, prior to the students' suspensions, gave rise to an action for damages which are "inherent in the nature of the wrong" and may be awarded without proof of actual loss. *Piphus* v. *Carey*, 545 F.2d

30, 31 (7th Cir. 1976). The court further held that the award of general compensatory damages should be in an amount "neither so small as to trivialize the right nor so large as to provide a windfall." *Id.*, 32 (footnote omitted).

If plaintiffs had sustained their burden of proof, they would have been entitled, of course, to an award of special compensatory damages for any actual injury which they suffered as a result of defendants' failure to afford adequate hearings prior to their suspensions. An award of special damages might have encompassed elements such as mental distress and the value of the school days lost because of the invalid suspensions. *Id.*, 31-2.[5] To recover special damages, plaintiffs would have been required to establish causation: "These damages . . . and any others flowing from the suspension . . . would be recoverable only if a plaintiff's suspension would not have occurred absent the due process violation." *Id.*, 32.[6] According to the Sev-

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[5] The Court of Appeals affirmed the district court's finding that plaintiffs had failed to prove the existence of any actual injury, such as mental distress. *Piphus* v. *Carey*, 545 F.2d 30, 31 (7th Cir. 1976). The Court of Appeals held, however, that the district court erred "in not considering the possibility of special damages for the school days plaintiffs lost as a result of their suspensions." *Id.*, 32. Neither of these holdings with respect to special damages is presently before the Court.

[6] The Court of Appeals was obviously correct in requiring that causation be established to support an award of actual damages. In *Mt. Healthy School District* v. *Doyle*, ... U.S. ....., 97 S.Ct. 568 (1977), a non-tenured teacher alleged that he had been discharged in violation of his First Amendment rights. He sought reinstatement and damages. The district court found that Doyle's First Amendment activity had played a *substantial* part in the school board's decision to terminate his employment, and the court ordered that he be reinstated with back pay. The Court of Appeals af-

(footnote continued)

enth Circuit's formulation, however, plaintiffs are entitled to an award of general compensatory damages without any evidence beyond that which is necessary to establish the due process violation itself.[7] This approach to damages violates the principle that compensatory damages should reflect, as nearly as possible, the value of the actual injury sustained by the complainant. In ascertaining the parameters of the generally accepted legal principles which, under Section 1988, the federal courts are bound

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(footnote continued)
firmed the judgment of the district court. This Court reversed, holding that the district court erred in failing to determine "whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 97 S.Ct. 568, 576. Noting that the First Amendment should not provide a shield for incompetent or otherwise undesirable teachers, the Court held that a school teacher would not be entitled to back pay and reinstatement if the school board were able to show that the teacher would have been discharged in any event. Although the school board technically violated Doyle's constitutional rights by *considering* his First Amendment activity in connection with the decision to terminate his employment, the Court did not suggest that Doyle would be entitled to general compensatory damages for the constitutional violation itself.

[7] An example illustrates one serious difficulty with the Seventh Circuit's formulation: Suppose that a student is suspended from school without a hearing at the beginning of the lunch period. He returns to school during the lunch period with an attorney, who is immediately afforded the opportunity to conduct a full adversary hearing. Before the lunch period is over, the hearing is completed and the school officials again determine that the student should be suspended. Although the student has suffered no loss, the school officials are liable for an award of general compensatory damages pursuant to the rule established by the Seventh Circuit.

to apply in civil rights cases, it is useful to consider the careful approach to measuring damages taken by the lower federal courts in cases concerning other constitutional rights.

The lower federal courts have consistently adhered to the principle that compensatory damages in civil rights cases should be strictly compensatory. The courts have frequently considered the appropriate elements of a damage award for constitutional violations in the context of public employment discharge cases, where employees have been terminated because of racial discrimination or in retaliation for the exercise of First Amendment rights. In these cases, the courts have not allowed general compensatory damages; they have consistently required proof of actual loss to the employee. Generally, an employee is entitled to damages only in an amount equal to that which he would have received if he had remained on the public payroll, less the amount that he reasonably could have received at other suitable employment. Griffis & Wilson, *Constitutional Rights And Remedies In The Non-Renewal Of A Public School Teacher's Employment Contract,* 25 Baylor L.Rev. 549, 584-7 (1973). An employee who has been discharged in violation of his constitutional rights has a duty to mitigate his damages; he will not receive a windfall. These cases demonstrate a careful adjustment of remedies to compensate only for *actual* injuries sustained by victims of racial discrimination or retaliation for First Amendment activity. General compensatory damages are not allowed even in these specially protected areas.

In *Rolfe* v. *County Board of Education,* 391 F.2d 77 (6th Cir. 1968), two black teachers assigned to segregated black schools were discharged because of their race when the local school board desegregated the district's schools. The former teachers brought an action for reinstatement and damages against the school board and the superinten-

dent of schools, alleging that they were discharged because of racial discrimination. The district court found that the teachers were discharged solely because of their race, and held that they "were entitled to recover as damages the amount they would have earned if they had been permitted to teach, less what they might have earned in some other suitable employment by reasonable diligence." *Id.*, 81. The Court of Appeals for the Sixth Circuit approved this measure of damages. While the school board was required to sustain the burden of proof with respect to mitigation of damages, the court held that the teachers themselves had a duty to mitigate their damages even in the wake of an unconstitutional discharge based on racial discrimination. Likewise, in *Williams* v. *Albemarle City Board of Education,* 508 F.2d 1242, 1243 (4th Cir. 1974) (*en banc*), the Fourth Circuit "assume[d] the correctness of the school board's contention that a teacher or school administrator, 'demoted' or discharged illegally may be precluded from the recovery of damages therefor by an unreasonable refusal to accept alternative employment." Williams, a black principal, was demoted to the rank of assistant principal when the school district implemented its desegregation plan. The district court found that William's demotion was racially motivated. *Accord, Lee* v. *Macon County Board of Education,* 453 F.2d 1104, 1114 (5th Cir. 1971); *McBeth* v. *Board of Education,* 300 F. Supp. 1270, 1275 (E.D. Ark. 1969).

In *Jannetta* v. *Cole,* 493 F.2d 1334 (4th Cir. 1974), a municipal fireman was discharged from public employment because he had circulated a petition, which he presented to the city manager, protesting the promotion of a fellow worker whom he believed to be unqualified for the position to which he was promoted. The district court found that the fireman was unconstitutionally discharged and ordered that he be awarded back pay from the date of discharge to the date of judgment. The Court of Appeals affirmed the back pay award, in principle, but held that "the award should have been reduced by any increase in Jannetta's outside earnings attributable to his lack of employment by the fire department." *Id.*, 1335. Emphasizing the compensatory character of damages for civil rights violations under Section 1983, the Fourth Circuit noted that, "The employee should be made whole, but not enriched." *Id.*, 1338. *Accord, Wellner* v. *Minnesota State Junior College Board,* 487 F.2d 153, 157 (8th Cir. 1973).

In *Stolberg* v. *Members of Board of Trustees of State Colleges of Connecticut,* 474 F.2d 485 (2d Cir. 1973), a state college professor was discharged in retaliation for his exercise of First Amendment rights. The district court held that the professor, who was able to secure another college teaching position at a lower salary, was entitled to an award of compensatory damages in an amount which represented the difference in earnings between the salaries he earned or would have earned at the two colleges. Additional compensatory damages for humiliation, mental distress and injury to reputation were not allowed because the teacher had failed to sustain his burden of proof. While affirming the judgment of the district court, the Court of Appeals for the Second Circuit specifically noted that the district court's findings of fact "reveal an unpleasant picture, characterized by reactionary and rather high-handed conduct on the part of a college president toward a faculty member, approved by some trustees and tolerated by others." *Id.*, 487. Finally, in *Smith* v. *Losee,* 485 F.2d 334 (10th Cir. 1973) (*en banc*), *cert. denied,* 417 U.S. 908 (1974), the Tenth Circuit held that a university professor, who had been discharged without due process because of First Amendment activity, was not entitled to compensatory damages because he had found alternative employment at a comparable or higher salary. In *Smith,* the court found that the university officials had been motivated by actual malice, and that the discharged profes-

sor had been terminated without due process because he had expressed opposition to certain administration policies. Nonetheless, the court held that "the record contains no evidence to support an award of general damages." *Id.*, 344.

In each of these cases, public employees were discharged in violation of their constitutional rights to due process, equal protection of the laws, or free speech. In some cases, multiple constitutional violations occurred. Even in the most egregious cases, however, the courts did not award general compensatory damages in recognition of the constitutional violation itself.[8] The courts limited the award

[8] The lower federal courts have taken a similar approach to the question of damages under the Fair Housing Act, 42 U.S.C. §3601 *et seq.* Section 3612(c) provides that, "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff." 42 U.S.C. § 3612(c) (1968). As actual damages, the courts have allowed recovery of out-of-pocket losses suffered because of racial discrimination in violation of the substantive provisions of the Fair Housing Act. *Steele* v. *Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973); *Smith* v. *Sol D. Adler Realty*, 436 F.2d 344 (7th Cir. 1971). If a plaintiff sustains his burden of proof, he may also receive compensatory damages for mental anguish, humiliation and emotional distress. *Seaton* v. *Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974). If a violation of the Fair Housing Act is established, but no actual damages are proved, only nominal damages may be awarded. *Fort* v. *White*, 530 F.2d 1113 (2d Cir. 1976).

While a back pay award pursuant to Title VII of the Civil Rights Act of 1964 is, strictly speaking, an equitable remedy, this Court has emphasized that the purpose of such an award is compensatory. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976), the Court noted that "federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect *restitution, making whole* insofar as possible the victims of racial discrimination in hiring." (emphasis added) (footnote omitted). *See*, 42 U.S.C. § 2000e *et seq.*; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).

of damages to an amount necessary to compensate for injuries actually sustained because of the unconstitutional actions of state officials. Public employees were required to seek other employment and mitigate damages even when discharged for the most clearly unconstitutional reasons. Implicit in these decisions is a recognition that victims of unconstitutional activities must be made whole, but that public officials and the states should not be punished for unconstitutional acts unless the proof establishes that the proper threshold for punitive damages has been met.

C. At Most, Nominal Damages May Be Awarded In Recognition Of A Technical Breach Of A Legal Duty Which Does Not Result In Actual Injury.

In many cases, the courts have simply declined, in the absence of proof of actual injury, to award any damages for a technical violation of rights. An alternative approach has been to allow recovery of nominal damages. "The term nominal damages means a trivial sum—usually one cent or one dollar—awarded to a plaintiff whose legal right has been technically violated but who has proved no real damage." *Chesapeake & Potomac Tel. Co.* v. *Clay*, 194 F.2d 888, 890 (D.C. Cir. 1952). In some circumstances, the law has allowed recovery of nominal damages when an injured party has proved a violation of certain legal rights without any showing of consequential harm. Whether nominal damages will be allowed depends on the nature of the legal right that has been violated. Professor McCormick has explained this principle:

> Many legal rights are rights that the person owing the duty *shall refrain from inflicting actual loss or detriment* (physical, pecuniary or otherwise) by certain kinds of conduct. Obviously, if the conduct occurs but detriment does not result, the right has not been violated. On the other hand, there is a large group of rights which are not thus conditioned, but

> are so-called "absolute" rights that the person subject to the duty shall not act or refrain in a given manner at all events, regardless of whether loss or practical disadvantage results. In effect, this means that the courts will allow an adverse ruling against the party owing the duty, if he violates it, though he caused no loss. If such a right has been breached, with loss resulting, the party aggrieved gets judgment for substantial damages measured by the loss, but if breached with no loss resulting, or no loss proved, then the person aggrieved gets judgment anyway, and since practically the only kind of judgment against a party that the common law knew was a judgment for "damages," i.e., a money recovery, a judgment for trivial or "nominal" damages was given. The recognition of a right unrelated to detriment sustained is merely a metaphorical prophetical way of stating that in given conditions an adverse judgment will be given without a showing of loss.

C. McCormick, *Handbook On The Law Of Damages* § 20, p. 86 (1935) (emphasis in original).

In short, McCormick states that the appropriate remedy for a technical breach of an "absolute" right is a judgment for damages in a trivial or nominal amount. Sedgwick also states that, "It is now well established that nominal damages may be recovered for the bare infringement of a right, or for a breach of contract, unaccompanied by any actual damage." 1 T. Sedgwick, *On Damages* § 98, p. 167 (9th ed. 1912) (footnote omitted). The denial of a student's constitutional right to due process, in the absence of any proof of actual injury,[9] is a paradigmatic

[9] In this context, actual injury could encompass such elements as emotional and mental distress, humiliation and loss of reputation, as well as out-of-pocket and consequential pecuniary losses. The lower federal courts have recognized the availability of such damages if proved. *Piphus* v. *Carey*, 545 F.2d 30, 31-2 (7th Cir. 1976); *Stolberg* v. *Members of Board of Trustees of State Colleges of Connecticut*, 474 F.2d 485 (2d Cir. 1973).

example of a technical breach of an "absolute" right. Nominal damages would seem to be an appropriate remedy for technical civil rights violations.

While this Court has not previously considered the propriety of nominal damages in the context of a constitutional deprivation, it is significant that the Reconstruction Congress which enacted Section 1983 specifically noted the issue. Senator Thurman of Ohio made reference to the fact that, in some cases, only nominal damages might be recovered:

> [Section 1983] authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; *they may be what lawyers call merely nominal damages*; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.
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> In the next place, I am opposed to this transfer of jurisdiction to the Federal courts because of the expense and the inconvenience that must attend it. In most of the States the Federal courts are held in not more than two places; there are very few in which they are held in as many as three places. Let an action be brought, therefore, in the Federal court, *it may be but for five dollars,* and the defendant may be dragged hundreds of miles, at great expense, to attend to the defense of the suit, and not he only, but also the witnesses who may be necessary to make out his defense.

Cong. Globe, 42d Cong., 1st Sess., App. 216 (1871) (emphasis added).

The legislative history of the Civil Rights Act of 1871 demonstrates that Congress considered and debated this legislation against the background of established principles of the law of torts. Neither the supporters nor the opponents of the legislation contemplated the possibility of an award of damages not based on actual injury. That Senator Thurman, an opponent of the Civil Rights Act, based his opposition on the fact that the legislation would open the federal courts to lawsuits involving only nominal damages, illustrates that Congress did not contemplate that substantial damages, in a speculative amount, might be awarded for technical civil rights violations in the absence of actual injury.

Following the general rule that nominal damages may be awarded when rights are technically violated, the lower federal courts have awarded nominal damages where violations of constitutional rights have not resulted in any actual injury to the person whose rights were violated. In *United States ex rel. Tyrrell* v. *Speaker,* 535 F.2d 823 (3rd Cir. 1976), for instance, a state pretrial detainee was arbitrarily transferred from a county jail to a state prison. When the detainee arrived at the state prison, he was immediately placed in administrative segregation, where he remained for more than eight months. In a Section 1983 action, the detainee alleged that this treatment denied him due process of law. The district court held that the defendant state officials had violated the pretrial detainee's constitutional rights by subjecting him to conditions of confinement more onerous than those which were imposed on prison inmates who had been convicted of crimes. The court also found, however, that Tyrrell was not actually prejudiced by the transfer because the conditions of his confinement in the county jail were considerably more restrictive than those of the segregation unit of the state prison to which he was wrongfully transferred. Consequently, the district court entered judgment for the

pretrial detainee, but awarded only "nominal" damages in the amount of $500. The Third Circuit affirmed the judgment of the district court, to the extent that it allowed only nominal damages, but reduced the amount of the award to one dollar.

The First Circuit, in *Magnett* v. *Pelletier,* 488 F.2d 33 (1st Cir. 1973), affirmed a judgment for nominal damages in a Section 1983 action based on a warrantless search. In *Magnett,* a police officer searched an apartment without a warrant and entered a room in which four small children were sleeping. The children's father, who was also present in the apartment, sought damages from the police officer for the invasion of the apartment and for an alleged assault, which caused him physical and emotional injuries. The district court was not persuaded by the evidence that an assault had occurred, but awarded "nominal" damages in the amount of $500 because plaintiff had established a violation of his civil rights by proving the fact of a warrantless search. The Court of Appeals held that an award of nominal damages was appropriate, but reduced the amount of the award to one dollar. The court noted that, "Nominal damages are a mere token, signifying that the plaintiff's rights were technically invaded even though he suffered, or could prove, no loss or damage." *Id.,* 35. *Accord, Paton* v. *LaPrade,* 524 F.2d 862, 871-2 (3rd Cir. 1975).

In *Bell* v. *Gayle,* 384 F.Supp. 1022 (N.D. Tex. 1974), three city policemen alleged that they were deprived of their constitutional rights when they were discharged without due process hearings. None of the three police officers suffered any pecuniary loss because each earned more money after the discharge than he had earned previously. The court held that the defendant city officials had violated the police officers' constitutional rights, but that no actual damages should be awarded because the officers had failed to prove any decrease in earnings. The

court awarded nominal damages, nonetheless, because "a citizen's constitutional rights are of such a value that *nominal* damages are presumed to flow from the deprivation of such rights." *Id.*, 1026 (emphasis added). Likewise, in *Berry* v. *Macon County Board of Education*, 380 F.Supp. 1244 (M.D. Ala. 1971), the court awarded only nominal damages to wrongfully discharged school board employees who had found jobs with higher pay after their discharges. The district court noted that, "Proof of a wrong done in violation of 42 U.S.C.A. § 1983 is taken as sufficient proof of nominal damages." *Id.*, 1248.

An award of nominal damages is consistent with the well-established principle that, even in civil rights cases, the purpose of a damage award is to compensate the injured party for actual losses resulting from the conduct of the wrongdoer, not to penalize the wrongdoer or to invest the injured party with a windfall. *Cordeco Development Corporation* v. *Santiago Vasquez*, 539 F.2d 256, 262 (1st Cir. 1976), *cert. denied*, ... U.S. ....., 97 S.Ct. 488 (1977). As the First Circuit noted in *Cordeco*, "A party's financial loss is the ultimate measure of his damage." *Id.* Nominal damage awards permit the courts to recognize, symbolically, the unauthorized invasion of important rights, without artificially shifting a non-existent loss.

D. The Court Of Appeals Erred In Holding That General Compensatory Damages Must Be Awarded When A Student Proves That He Was Denied His Constitutional Right To Due Process But Fails To Establish The Existence Of Any Actual Injury.

In this case, the Court of Appeals disregarded well-established principles in holding that a civil rights plaintiff need not prove any actual injury to recover general compensatory damages in a substantial amount. The Seventh Circuit reasoned that a citizen, who has been denied

due process, need not prove any individualized injury to recover compensatory damages because general compensatory damages are "inherent in the nature of the wrong." *Piphus* v. *Carey*, 545 F.2d 30, 31 (7th Cir. 1976). The decision of the Seventh Circuit is inconsistent with familiar principles governing the law of damages and is, therefore, inconsistent with the limits which Congress has placed on the discretion of the federal courts under Section 1988.

The decision of the Court of Appeals in this case is consistent only with the Seventh Circuit's previous decision in *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). In *Hostrop*, the president of a public junior college was dismissed, without a due process hearing, for reasons which the district court later held to constitute just cause. The Court of Appeals noted that "it is inconceivable that even if plaintiff had been accorded his due process rights he would have been allowed to continue in office." *Id.*, 579. Although Hostrop had not proved any actual loss, the court held that he was entitled to general compensatory damages, which were inherent in the nature of the constitutional violation itself:

> The wrong done plaintiff was not the termination of his employment, for that has been determined to have been justified, . . . but the deprivation of his procedural due process right to notice and hearing. Plaintiff is entitled to damages for that constitutional violation.

Id.

The *Hostrop* court's award of general compensatory damages was based on an erroneous construction of this Court's decision in *Nixon* v. *Herndon*, 273 U.S. 536 (1927). The Seventh Circuit construed *Nixon* as establishing the principle that general compensatory damages must be awarded whenever a violation of constitutional rights is

established, even if the plaintiff fails to prove any actual loss. A close analysis of *Nixon* does not support that broad conclusion. In *Nixon*, a black citizen brought an action for damages, in the amount of five thousand dollars, against certain Texas election judges who, acting in accordance with a racially discriminatory state law, prevented him from voting in a party primary election. The district court dismissed the complaint on the ground that the subject matter of the suit was political and not within the jurisdiction of the federal courts. This Court reversed. Mr. Justice Holmes, writing for a unanimous court, said that:

> The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years.

Id., 540.

The *Nixon* court had no occasion to consider the type or amount of damages which might be awarded to a black citizen who was denied the right to vote in a party primary election because of his race. The district court had dismissed Nixon's complaint, at the pleading stage, because it believed that the regulation of state party primary elections was a political matter beyond the jurisdiction of the federal courts. This Court held only that the district court erred in dismissing the complaint. While Nixon sought damages in the amount of five thousand dollars, this Court did not consider whether he would be entitled to that or any specific amount.[10] Neither did the

[10] Section 24 of the Judiciary Act of March 3, 1911, 36 Stat. 1091-2, now codified in relevant part as 28 U.S.C. § 1343 (1948), confers jurisdiction on the federal courts, without regard to the amount in controversy, in cases of civil rights violations such as that which formed the basis for Nixon's complaint.

Court consider the merits of any particular theory upon which Nixon would be entitled to damages of a specific type. Indeed, this Court held only that Nixon's complaint, which alleged that he had been denied the right to vote because of his race, stated a cause of action which the district court had jurisdiction to determine. Whether Nixon could recover compensatory, punitive or nominal damages was an issue which the Court left open, to be determined upon a full factual record. Contrary to the *Hostrop* court's conclusion, this Court's decision in *Nixon* did not establish that general compensatory damages must be allowed for technical violations of constitutional rights.[11]

[11] The *Hostrop* court also relied on *Wayne* v. *Venable*, 260 Fed. 64 (8th Cir. 1919), for the principle that general compensatory damages must be awarded, without proof of individualized injury, whenever constitutional rights are violated. At first blush, the language of *Wayne* would seem to support that proposition. In *Wayne*, the Circuit Court said: "In the eyes of the law the right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. *Scott* v. *Donald*, 165 U.S. 89, 17 Sup.Ct. 265, 41 L.Ed. 632; *Wiley* v. *Sinkler*, 179 U.S. 58, 65, 21 Sup.Ct. 17, 45 L.Ed. 84." *Id.*, 66. This Court's decisions in *Scott* and *Wiley* do not, however, support the broad conclusion stated by the lower court in *Wayne*.

In *Wiley* v. *Sinkler*, 179 U.S. 58 (1900), a resident of Charleston, South Carolina, brought an action for damages against certain local election officials who refused to allow him to vote in a congressional election. The Circuit Court dismissed the complaint for failure to state a cause of action because the plaintiff failed to allege that he was a duly registered voter of the State of South Carolina. This Court affirmed the dismissal, holding that the complaint did

(footnote continued)

Traditionally, the law has required proof of actual injury as a prerequisite to an award of compensatory damages in a substantial amount. In the absence of proof of actual injury, the courts have declined to award damages,

(footnote continued)
not allege facts sufficient to state a cause of action because it failed to allege that the plaintiff was a duly registered voter. *Id.*, 66. While the Circuit Court dismissed the complaint and this Court affirmed the dismissal solely on that ground, this Court discussed, in *dicta*, the other grounds for dismissal urged in the lower court.

The defendants also argued in the Circuit Court that the complaint should be dismissed because the complaint did not, on its face, affirmatively state that a federal question was involved, and because the face of the complaint demonstrated that a verdict for $2,000 would be so excessive that the court would be required to set it aside. First, this Court noted that a federal question was clearly presented by the facts alleged in the complaint. Second, the Court said that the complaint should not be dismissed at the pleading stage for failure to meet the jurisdictional amount. "[N]o opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court." *Id.*, 65. The type and amount of damages which Wiley might recover could be determined only upon a full factual record. Even in dicta, the Court suggested only that the complaint should not be dismissed on jurisdictional grounds.

The *Wayne* court's reliance on *Scott* v. *Donald*, 165 U.S. 58 (1897), is also misplaced. In *Scott*, which was also cited by this Court in *Wiley*, the Court held only that *punitive* damages may be awarded in a civil rights action, and that a prayer for punitive damages will satisfy the jurisdictional amount when the amount of actual damages alleged would not. The Court said:

> The intentional, malicious and repeated interference by the defendants with the exercise of personal rights and privileges secured to the plaintiff by the Constitution of the United States, as alleged in the complaint, constitutes, as we think, a wrong and injury not the subject of compensation by a mere money standard, but fairly within the doctrine of the cases wherein
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> (footnote continued)

or they have awarded damages only in a trivial amount to symbolize a technical breach of an important legal duty. Under Section 1988, the same principles must be applied in a Section 1983 civil rights action.

II.

Awards Of General Compensatory Damages For Technical Due Process Violations Are Improper Because They Are Punitive In Effect, Unnecessary To The Proper Enforcement Of The Civil Rights Act, And Their Potential Harm To The Public Schools Far Outweighs Any Possible Benefit To Students.

Considerations of public policy also preclude the allowance of general compensatory damage awards when a public school student's due process rights are technically violated, without actual malice on the part of the school officials or proof of actual injury to the student. First, general compensatory damages are inherently speculative and unprincipled. The Seventh Circuit's failure to articulate any precise standard for guiding the factfinder in assessing general compensatory damages underscores the arbitrary character of such an award. In effect, there is nothing to distinguish general compensatory damages

(footnote continued)
> exemplary damages have been allowed. Those allegations of the complaints, though denied in the answers, have been sustained by the tribunal—in these cases the court, a jury having been waived—which had to pass upon the issues of fact.

Id., 89.

This Court's decision in *Scott* does not support the proposition that general compensatory damages must be awarded whenever a technical violation of constitutional rights occurs. Indeed, *Scott* merely supports the principle that damages, which are punitive in nature, may be allowed only when the requisite threshold of actual malice is met.

from punitive damages. By requiring awards of general compensatory damages, the Court of Appeals has required the factfinder to award damages which are punitive in fact, without requiring the proof of actual malice that is the customary prerequisite for punitive awards. Second, an adequate arsenal of remedies for the protection of civil rights currently exists. The enforcement of the civil rights acts will not be enhanced by allowing awards of general compensatory damages. Third, liability for general compensatory damage awards will seriously interfere with the local administration of the public schools. Judgments of this type must be satisfied either by individual school officials or by their school districts. If school board members must devote their personal resources to this end, capable citizens will be dissuaded from volunteering their services to the business of managing the nation's schools. If school boards choose to indemnify board members, as an incentive for them to serve, scarce public funds will be diverted from their primary purpose of financing education. In either case, the loss to the public schools will be great. Moreover, the windfall character of general compensatory damage awards makes this allocation of scarce resources particularly difficult to defend. In short, the potential harm to the public schools cannot be justified by any benefit which the imposition of liability might contribute to the enforcement of the civil rights acts in the school context.

A. General Compensatory Damages Are Improper Because They Are Punitive In Their Effect.

The Court of Appeals held that, "The award [of general compensatory damages] fixed by the District Court should be neither so small as to trivialize the right nor so large as to provide a windfall." *Piphus* v. *Carey*, 545 F.2d 30, 32 (7th Cir. 1976) (footnote omitted). The difficulty with

this rule of damages is clear on its face: the broad and unstructured discretion which the rule explicitly confers on the factfinder, to determine the amount of an appropriate award, is wholly inconsistent with the notion of principled compensation. Inasmuch as the court's rule offers no objective standard for measuring the extent of the injury sustained, it also fails to provide any objective standard for measuring damages. Indeed, the absence of an objective standard in the Seventh Circuit's formulation implicitly invites the factfinder to measure the extent of a "compensatory" award by reference to purely subjective factors, a measuring principle which has been limited to the realm of punitive damages.

An award of general compensatory damages based on the Seventh Circuit's formula must, by definition, be subjective, speculative and unprincipled. Moreover, an award of general compensatory damages for a technical violation of a student's due process rights, without proof of actual malice or actual injury, will be an award of damages, which is punitive in effect, without requiring the proof of aggravating circumstances that is the traditional prerequisite for an award of punitive damages. For purposes of official liability, the rule of damages set forth by the Court of Appeals eviscerates the distinction between compensatory and punitive damages.[12]

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[12] One commentator has suggested that "many so-called compensatory awards in constitutional tort cases are, in fact, punitive in nature." Yudof, *Liability For Constitutional Torts And The Risk-Averse Public School Official*, 49 S.Cal.L.Rev. 1322, 1380 n. 211 (1976). It does not follow, of course, that the blurring of the compensatory-punitive distinction is a felicitous development in the law of official liability. While constructive malice may be sufficient to justify compensatory damages under *Wood* v. *Strickland*, 420 U.S. 308 (1975), public school officials should not be subject to liability for damages which are punitive in effect without proof of actual malice. The fact that such awards are labelled "compensatory" rather than "punitive" is immaterial.

The damage remedy as a method of punishment is generally considered suspect; its use requires caution. Even when the traditional malice threshold is met, "[a] chief criticism . . . of the doctrine of exemplary damages, is the absence of any standard or criterion to guide the jury at arriving at a proper amount." C. McCormick, *Handbook On The Law Of Damages*, § 85, p. 296 (1935). While the need for discouraging truly malicious conduct may sometimes justify an award of punitive damages, for want of a better method of deterrence, the unstructured discretion implicit in the power to award punitive damages cannot be justified without proof of actual malice or other aggravating circumstances. Certainly, it may not be justified as a principle of compensation, rather than punishment.

In a broader sense, punitive damages may be undesirable as a matter of public policy, even when actual malice exists, because the moral force and retributive effect of punitive damages may unnecessarily upset particularly delicate and felicitous relationships. One commentator has noted, for instance, that punitive damages may be counterproductive in the labor context: "Giving judicial recognition to the kind of moral distinctions involved in retributive awards would exacerbate relations between unions and employers and thereby contravene the central purpose of the [Labor Management Relations] Act." Note, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 Cal.L.Rev. 191, 207 (1972). *See also, United Auto Workers* v. *Russell*, 356 U.S. 634, 653 (1958) (Warren, C.J., dissenting). The sensitive nature of educational relationships, the need to encourage civility in the schoolroom and the need to discourage the development of adversary relationships among those interested in the educational process, suggest that a similar reluctance to award punitive damages may be advisable in the educational context. *See*, Kirp, *Proceduralism And Bureaucracy: Due Process In the School Setting*, 28 Stan.L.Rev. 841 (1976).

Even if punitive damages, in an orthodox sense, may occasionally be necessary in the school context, punitive damages should not be allowed in the guise of general compensatory damages when the traditional prerequisites for punitive damages are not met. The allowance of general compensatory damages would exacerbate delicate relations, between students, teachers, parents and school board members, upon which the success of the public schools is founded. Strong considerations of public policy require that the threshold requirements for punitive damages should be maintained in the school context. For this reason, general compensatory damages should not be allowed when students' due process rights are violated without actual malice or injury.

B. An Arsenal Of Adequate Remedies Currently Exists To Vindicate The Civil Rights Acts.

Whether the allowance of general compensatory damages would substantially enhance the enforcement of the federal civil rights acts is a question which must be considered against the background of presently existing remedies. In the analogous area of implied constitutional remedies, under *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), one commentator has suggested that the focus for analysis should be "upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought." Dellinger, *Of Rights And Remedies: The Constitution As A Sword*, 85 Harv.L.Rev. 1532, 1551 (1972). A review of existing remedies demonstrates that

an arsenal of remedies presently guarantees that a student's civil rights will be effectively vindicated in the event of an unconstitutional suspension.

A student who is suspended from school without due process may recover actual damages. In *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975), this Court held that, "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." While recognizing the necessity for a qualified immunity in the school context, the Court held in *Wood* that school officials are liable for actual damages sustained by students who have been deprived of their constitutional rights through actions of school officials that do not meet the qualified immunity requirements.

In addition to pecuniary or out-of-pocket loss, the lower federal courts have held that compensatory damages in Section 1983 cases may also encompass compensation for loss of reputation, mental and emotional distress, or pain and suffering, if these elements are supported by proof. *Piphus* v. *Carey*, 545 F.2d 30, 31 (1976). In *Donovan* v. *Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970), the Ninth Circuit held that an unconstitutionally discharged public employee was entitled to damages for emotional and mental distress arising out of the wrongful discharge when he presented evidence sufficient to support that element of damages. Likewise, in *Stolberg* v. *Members of Board of Trustees of State Colleges of Connecticut*, 474 F.2d 485, 489 (2d Cir. 1973), the Second Circuit noted that an unconstitutionally discharged college professor could recover compensatory damages, in a Section 1983 action, for humiliation, distress and injury to reputation, upon proof of having sustained

these injuries. In *Stolberg*, the Court of Appeals affirmed the district court's denial of any award for injury to reputation, humiliation or distress, however, on the ground that Stolberg had failed to prove these elements of injury. The court emphasized that a civil rights plaintiff must sustain the burden of proving damages for injury to reputation, humiliation and distress; these elements of damages will not be presumed from the fact of the constitutional violation itself.

The lower federal courts have also held that a party whose civil rights have been violated may recover punitive damages, in an appropriate case, if he is able to establish either the existence of aggravating circumstances or that the person who acted under color of state law to deprive him of his constitutional rights was motivated by actual malice. *Hague* v. *Committee For Industrial Organization*, 101 F.2d 774, 789 (3rd Cir. 1939), *mod. on other grounds*, 307 U.S. 496 (1939). In *Basista* v. *Weir*, 340 F.2d 74, 87-8 (3rd Cir. 1965), the Third Circuit held that punitive damages may be awarded for an illegal arrest when only nominal damages are proved. Other courts have held that punitive damages may be awarded, provided that aggravating circumstances are present, in the absence of proof of actual loss. *Silver* v. *Cormier*, 529 F.2d 161 (10th Cir. 1976); *Spence* v. *Staras*, 507 F.2d 554 (7th Cir. 1974).

In addition to actual compensatory and punitive damages, numerous remedial devices exist for the vindication of federal civil rights. In an appropriate case, a civil rights plaintiff may secure injunctive and declaratory relief against unconstitutional state activities. *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). To further encourage private parties to vindicate their constitutional rights, Congress has recently amended Section 1988 to provide that the federal courts may, in their discretion, award

reasonable attorneys' fees to the prevailing party in civil rights litigation. 42 U.S.C. § 1988 (1976). *See*, 1976 *U.S. Code Cong. & Ad. News* 5908. Together with the substantive remedies previously recognized by the federal courts, the attorneys' fees provision of Section 1988 guarantees that meritorious civil rights claims will continue to be pressed in the federal courts.[13] Finally, the possibility of criminal prosecution for certain wilful violations of federal civil rights under color of state law provides an additional incentive for compliance with the federal civil rights statutes. 18 U.S.C. § 242 (1948). *See, Screws* v. *United States,* 325 U.S. 91 (1945).

The American tradition of local community control of the public schools also provides special safeguards for the protection of students' constitutional rights. Local control of the public schools, by persons elected or appointed by their communities, necessarily creates a climate of responsibility in which school officials are held strictly accountable for their actions. "[B]y virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform." *Hortonville Joint School District No. 1* v. *Hortonville Education Association,* 426 U.S. 482, 496 (1976). Certainly, a local community will not long tolerate school officials who do not respect the constitutional rights of the community's children. As the Court noted in *Ingraham* v. *Wright,* ..... U.S. ....., 97 S.Ct. 1401, 1412 (1977), "The openness of the public school and its supervision by the community afford significant safeguards against the kind of abuses from which the Eighth Amendment protects the prisoner." While the Court was speaking of corporal punishment in *Ingraham,* the same principle applies to the protection of other constitutional interests. The openness of the schools to public scrutiny is a powerful deterrent to school officials who might be tempted to violate the constitutional due process rights of students. As one school official has suggested, a school administrator's self-interest will also aid in dissuading him from violating students' constitutional rights in the interest of administrative expediency:

> Any school administrator who is finally adjudged to have violated an individual's civil rights has not only had a considerable punishment in terms of a hurt reputation, but also in his employment relationship with his school district. His future even may be injured considerably.

Shannon, *Goss and Wood: Their Implications For School Practice,* 4 J.Law & Ed. 611, 613 (1975).

Shannon's observation applies equally to professional educators and lay school board members. Just as professional educators must expect that unconstitutional activities will adversely affect their careers in public education, school board members must face the probability that a pattern of constitutional violations will adversely affect the likelihood of their re-election or re-appointment to office.

In most cases, a civil rights plaintiff will be able to show that he is entitled either to actual compensatory damages, because of actual injuries sustained, or to injunctive and declaratory relief. If an injured party is able to prove aggravating circumstances or actual malice, he may also be entitled to punitive damages. An award of general

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[13] The number of civil rights cases filed in the federal courts has increased steadily in recent years. In 1944, only 21 cases were filed. Note, *The Proper Scope of The Civil Rights Acts,* 66 Harv.L.Rev. 1285 (1953). In 1975, 6461 civil rights cases, excluding prisoner and employment discrimination cases, were filed. Judicial Conference of the United States, Rep. of Proc.: Ann. Rep. of Director of Ad. Off. of U.S. Courts 346 (1976).

compensatory damages, to a party who fails to establish actual injury sufficient to justify actual damages or actual malice sufficient to justify punitive damages, will constitute a mere windfall, regardless of the amount. Given the arsenal of existing remedies, as well as the special safeguards provided in the school context, an award of general compensatory damages will have little material effect on the enforcement of the civil rights acts.

C. The Detriment To The Public Schools From General Compensatory Damage Awards Far Outweighs The Potential Benefit To Students.

The decision to impose additional liability on public officials always requires a balancing of the benefits to be gained against the harm that will result. Professor James has noted that:

> On the one hand [official liability] will tend to curb high-handed official action and other bureaucratic excesses. On the other, it will often inhibit objective and fearless action and discourage responsible men from taking public employment.

James, *Tort Liability Of Government Units And Their Officers*, 22 U.Chi.L.Rev. 610, 639 (1955) (footnote omitted).

While awards of general compensatory damages will have little effect on the enforcement of the civil rights acts, the threat of liability for such speculative awards will interfere significantly with the administration of the public schools. If public school officials are held liable for awards of general compensatory damages, judgments for these additional awards must be satisfied either from the personal funds of the officials or through some system of school district indemnification of school officials. Neither of these alternatives is desirable in terms of educational planning and financing.

Historically, the system of public education in the United States has depended upon the willingness of local community members to provide their services, usually without personal remuneration, to the business of managing the nation's public schools. The threat of substantial judgments for general compensatory damages could drastically disrupt these traditional arrangements. As this Court said in *Wood*, "The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." *Wood* v. *Strickland*, 420 U.S. 308, 320 (1975) (footnote omitted). The speculative nature of general compensatory damages necessarily prevents a rational assessment of the actual risk of liability, and it must be assumed that the threat of liability for awards of general compensatory damages will have an inordinately great deterrent effect on the willingness of capable citizens to undertake the tasks of school management. The alternative of school district indemnification of board members may be equally undesirable in that it would divert already scarce public funds from general educational purposes to satisfy judgments won by individual students who have suffered no actual injury.[14]

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[14] From an economic perspective, it might be suggested that higher salaries would compensate public officials for the financial risks inherent in personal liability for general compensatory damages. This solution is inappropriate in the school context because "[m]ost of the school board members across the country receive little or no monetary compensation for their service." *Wood* v. *Strickland*, 420 U.S. 308, 320 n.11 (1975). An alternative solution is insurance coverage. The cost of insurance coverage in this area has been great, however, because of the absence of sound actuarial statistics concerning civil rights violations. If general compensatory damages are allowed in these cases, the speculative and uncertain amounts of these damages will further encumber the actuarial process

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The financial difficulties of the nation's school systems are well known. While yearly expenditures for elementary and secondary education have risen from $18 billion to $75.1 billion in the past sixteen years,[18] one-half of the nation's population currently believes that too little money is being spent to improve the quality of American education. National Center for Education Statistics, The Condition Of Education: A Statistical Report On The Condition Of Education In The United States, 26, 53 (1976).

(footnote continued)
and will, consequently, further increase the cost of insurance coverage. Moreover, in some states, statutes prohibit insurance companies from paying damages awarded against a public official. In those states, insurance policies will be useful only in paying the costs of defense. Note, *The Right Insurance May Protect Your District And Your Wallet Alike*, 163 Am.Sch.Board J. 30 (1976). Even when available at a reasonable premium, however, insurance policies may be limited in value because of the difference in perspectives, between the insurance carrier and the school district, concerning the desirability of particular methods of conflict resolution. In an action for money damages and injunctive relief, for instance, an insurance carrier will probably concentrate on its own damage exposure while the school district, for sound educational reasons, may be more interested in achieving an acceptable solution to the injunctive element of the litigation. Shannon, *Goss and Wood: Their Implications For School Practice*, 4 J.Law & Ed. 611, 613 (1975). Professor Yudof has concluded that, "When the various pieces of the legal defense, indemnification and governmentally purchased insurance puzzle are put together, the picture that emerges for school officials is grim." Yudof, *Liability For Constitutional Torts And The Risk-Averse Public School Official*, 49 S.Cal.L.Rev. 1322, 1386-87 (1976).

[18] It is estimated that by 1980, an additional $24.5 billion in annual spending will be required to sustain the 1964-1974 rate of improvement in public school programs. McBride, *Where Will The Money Come From? Financing Education Through 1980-81*, 58 Phi Delta Kappan 248 (1976).

With the dramatically increasing costs of providing public services, school boards have found themselves engaged in fierce competition with other government agencies for scarce public funds. Shalala & Kelly, *Politics, The Courts And Educational Policy*, 75 Teachers C.Rec. 223, 229 (1973).

Current difficulties of school administration and financing would be severely aggravated if school districts were required to choose between indemnification and personal liability in satisfying judgments for general compensatory damages. In *Wood*, the Court recognized that strong considerations of public policy supported the imposition of a limited liability for compensatory damages upon public school officials. Those policy considerations do not support the imposition of liability for *general* compensatory damages. Inasmuch as judgments of this type would be unrelated to any actual harm sustained by the students whose rights were technically violated, the public policy rationale for imposing this costly choice on local school districts loses its vitality. Moreover, the likelihood that such a remedy would materially assist in enforcing the civil rights acts is so small as to make the imposition of this choice untenable.

This Court has frequently noted that, "The Fourteenth Amendment did not alter the basic relations between the States and the national government." *Screws* v. *United States*, 325 U.S. 91, 109 (1945). In *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), the Court said that the relations between the states and the national government should be guided by "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." The federal government must

act to vindicate and protect federal rights and federal interests, but it must always endeavor "to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* As Mr. Justice Frankfurter has said, "respect for principles which this Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies." *Monroe* v. *Pape,* 365 U.S. 167, 241-2 (Frankfurter, J., dissenting).

Whether the technical denial of a student's due process rights, without actual malice or injury, should give rise to an action for damages, which are compensatory in theory but punitive in fact, presents a question which is fundamental to federalism and to this nation's tradition of local control of the public schools. Considerations of federalism and comity are always present in civil rights cases challenging the activities of state officials. As Mr. Justice Frankfurter noted, "Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions." *Monroe* v. *Pape,* 365 U.S. 167, 222 (1961) (dissenting opinion). These considerations of federalism and comity are particularly significant in cases involving the public schools because "education is perhaps the most important function of state and local governments." *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954). Throughout our history, the conduct of the nation's public schools has rested within the province of the states and local governmental units. N. Edwards, *The Courts And The Public Schools* 23 (3rd ed. 1971). The Court has frequently noted the important interests served by this nation's commitment to local control of the public schools: "The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. . . . No area of social concern stands to profit more

from a multiplicity of viewpoints and from a diversity of approaches than does public education." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 49-50 (1973). *See also, Wright* v. *Council of City of Emporia,* 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting). The federal courts must, consequently, be solicitous of the arrangements which state and local governments have devised for the management of the public schools, and those arrangements must not be disturbed without good cause. *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968).

By sanctioning gratuitous awards of general compensatory damages, for merely technical violations of students' due process rights, this Court would seriously alter presently existing arrangements for administering the public schools. The financial impact of speculative and substantial awards upon school board members or the local schools would be dramatic. If judgments are to be satisfied by local school districts, scarce financial resources will be diverted from educational uses. If judgments must be satisfied by board members from their personal wealth, many capable citizens will be needlessly deterred from offering their services on behalf of the nation's schools. This restriction on the important supply of human resources now available to the schools would have serious effects. Indeed, this nation's commitment to local lay control of the schools might well be jeopardized in either case. The harm to the public schools clearly outweighs any marginal benefit which might arguably be gained in terms of effective enforcement of the civil rights acts.

CONCLUSION

Section 1988 requires that the federal courts fashion appropriate remedies, based on generally accepted legal principles, for vindication of the federal civil rights acts. In the absence of proof of actual injury, traditional principles of the law of remedies provide that no damages, or only nominal damages, may be awarded to a party whose rights have technically been violated. These principles, together with considerations of comity, federalism and school policy, foreclose an award of general compensatory damages in the circumstances of this case. For these reasons, National School Boards Association respectfully urges that the decision of the United States Court of Appeals should be reversed.

Respectfully submitted,

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Dated: July 6, 1977